RECORD, CASE No. 14,353.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., ~~307~~. 51

MICHAEL DONAHUE, PLAINTIFF IN ERROR,

vs.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 20, 1890.

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1 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Northern Division of the Western District of Michigan, of the —— Term, A. D. 188–.

WESTERN DISTRICT OF MICHIGAN, *ss:*

The Lake Superior Ship Canal, Railway and Iron Company, which is a corporation of the State of Michigan, plaintiff in this suit, which said corporation is a citizen of the State of Michigan, by Ball & Hanscom, its attorneys, complains of Michael Donahoe, of the county of Marquette, in the State of Michigan, who is a citizen of the State of Michigan, defendant, filing this declaration as commencement of suit, which is a suit arising under the laws of the United States.

For that whereas, the said plaintiff heretofore, to wit, on the 15th day of July, in the year one thousand eight hundred and eighty-five, was possessed of certain lands and premises, situate in the county of Marquette, in the State of Michigan, and the northern division of the western district of Michigan, known and described as follows, that is to say the west half of northwest quarter, and the northwest quarter of southwest quarter of section twenty-three (23) of township forty-three (43) north, of range thirty-five (35) west, of the value of more than five hundred dollars; which said land and premises the said plaintiff claims in fee under a grant from the United States, to wit: the act of Congress approved July 3rd, 1866, entitled "An act granting lands to the State of Michigan, to aid in the construction of a harbor and ship canal at Portage lake, Keweenaw county, Lake Superior, in said State," and under the selection and certification of said lands by the proper officers of the United States in accordance with said act.

And the said plaintiff being so possessed thereof, the said defendant afterward, to wit, on the fifteenth day of July, in the year one thousand eight hundred and eighty-five, entered into the said premises, and ejected the said plaintiff therefrom, and unlawfully withholds from the said plaintiff the possession thereof; and the said defendant claims the right to hold said lands, under the preemption laws of the United States, and that the said grant was void, so far as relates to said lands; that the said act did not operate thereon; and the determination of this suit depends upon the construction of said act of Congress, which is the question in controversy therein.

To the damage of the said plaintiff of one thousand dollars, and therefore it brings suit, etc.

BALL & HANSCOM,
Attorneys for Plaintiff.

2 [Endorsed:] (Copy.) No. 122. United States circuit court, western district of Michigan, northern division. Lake Superior Ship Canal, Railway and Iron Company *v.* Michael Donahoe. *Narr.* To the within-named defendant: Take notice that

on filing a declaration in this cause (of which the within is a true copy) as commencement of this suit, a rule was entered in the book of common rules, kept by the clerk of said court, in his office, in the city of Marquette, in the county of Marquette, in said district, requiring you to plead to said declaration within twenty days after the service upon you of a copy thereof, and notice of said rule or judgment, etc. Yours, etc., Ball & Hanscom, attorneys for pl'ff. Dated July 23, 1885. Filed July 23, 1885. W. S. Hill, dep. clerk.

3 The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
vs.
MICHAEL DONAHOE.

JULY 23, 1885.

On filing declaration in this cause as commencement of suit and on motion of Ball & Hanscom, attorneys for the plaintiff, it is ordered that the defendant in said cause plead to the said declaration within twenty days after service of a copy thereof on him and notice of this rule or judgment, &c.

BALL & HANSCOM,
Att'ys for Pl'ff.

W. S. HILL, *Dep. Cl'k.*

4 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Northern Division of the Western District of Michigan, of the —— Term, A. D. 188–.

WESTERN DISTRICT OF MICHIGAN, *ss:*

The Lake Superior Ship Canal, Railway and Iron Company, which is a corporation of the State of Michigan, plaintiff in this suit, which said corporation is a citizen of the State of Michigan, by Ball & Hanscom, its attorneys, complains of Michael Donahoe, of the county of Marquette, in the State of Michigan, who is a citizen of the State of Michigan, defendant, filing this declaration as commencement of suit, which is a suit arising under the laws of the United States.

For that whereas, the said plaintiff heretofore, to wit, on the 15th day of July, in the year one thousand eight hundred and eighty-five, was possessed of certain lands and premises, situate in the county of Marquette, in the State of Michigan, and the northern division of the western district of Michigan, known and described as follows, that is to say, the west half of northwest quarter and the northwest quarter of southwest quarter of section twenty-three (23), in township forty-three (43) north, of range thirty-five (35) west, of the value of more than five hundred dollars; which said land and premises the said plaintiff claims in fee, under a grant from the United States, to wit: the act of Congress approved July

3rd, 1866, entitled "An act granting lands to the State of Michigan, to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw county, Lake Superior, in said State," and under the selection and certification of said lands by the proper officers of the United States in accordance with said act.

And the said plaintiff being so possessed thereof, the said defendant afterward, to wit, on the fifteenth day of July, in the year one thousand eight hundred and eighty-five, entered into the said premises, and ejected the said plaintiff therefrom, and unlawfully withholds from the said plaintiff the possession thereof; and the said defendant claims the right to hold said lands, under the pre-emption laws of the United States, and that the said grant was void, so far as relates to said lands; that the said act did not operate thereon; and the determination of this suit depends upon the construction of said act of Congress, which is the question in controversy therein.

To the damage of the said plaintiff of one thousand dollars, and therefore it brings suit, etc.

BALL & HANSCOM,
Attorneys for Plaintiff.

5 [Endorsed:] (Copy.) No. 122. United States circuit court, western district of Michigan, northern division. Lake Superior Ship Canal, Railway and Iron Company *v.* Michael Donahoe. *Narr.* To the within-named defendant: Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of this suit, a rule was entered in the book of common rules, kept by the clerk of said court, in his office, in the city of Marquette, in the county of Marquette, in said district, requiring you to plead to said declaration within twenty days after the service upon you of a copy thereof, and notice of said rule or judgment, etc. Yours, etc., Ball & Hanscom, attorneys for pl'ff. Dated July 23, 1885. Filed August 1st, 1885. W. S. Hill, dep. clerk.

WESTERN DISTRICT OF MICHIGAN, *Northern Division,* } *ss:*

I hereby certify and return that on the 25th day of July, 1885, I served the declaration of which the within is a copy on Michael Donahoe, the defendant named in said declaration, by delivering to said defendant, in said district and division aforesaid, a true copy thereof, together with a true copy of the notice to appear and plead endorsed thereon as hereon endorsed.

JACOB DOLF,
Deputy U. S. Marshal.

Fees, $12.58.

6 (*Plea.*)

Circuit Court of the United States for the Northern Division of the Western District of Michigan.

MICHAEL DONAHOE
ads.
THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY.

Now comes the said defendant, by Egbert J. Mapes, his attorney, and demands a trial of the matters set forth in the declaration of the said plaintiff.

EGBERT J. MAPES,
Attorney for Defendant.

(Filed Aug. 11, 1885.
W. S. HILL,
Deputy Clerk.)

[Endorsed:] No. 122. United States circuit court, northern division, western district of Michigan. Michael Donahoe *ads.* Lake Superior Ship Canal, Railway & Iron Company. (Plea.) Filed Aug. 11, 1885. W. S. Hill, dep. cl'k. Egbert J. Mapes, attorney for defendant.

7 (*Substitution of Attorneys.*)

The Circuit Court of the United States for the Sixth Circuit and the Western District of Michigan, Northern Division.

LAKE SUPERIOR SHIP CANAL, RAILWAY & IRON COMPANY
vs.
MICHAEL DONAHOE.

I do hereby consent that Vosper Bros. be substituted as attorneys of record for above-named defendant in above-entitled cause.

Dated this 20th day of July, A. D. 1889.

E. J. MAPES.

(Filed July 22, 1889.
F. M. MOORE,
Dep. Clerk.)

[Endorsed:] No. 122. The circuit court of the U. S. for the sixth circuit and the western dist. of Michigan, northern division. L. S. S. C., R'y & I. Co. *vs.* Michael Donahoe. (Substitution.) Filed July 22, 1889. F. M. Moore, dept. clerk.

8–11 (Order commencing trial and appointing reporter and orders continuing trial omitted here in printing, per stipulation. See printed Record in Cunningham case, No. 1486, pp. 38, 39, and 40.)

12 UNITED STATES OF AMERICA:

Adjourned May Term, A. D. 1890.

SATURDAY, *July* 26, 1890.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
vs.
MICHAEL DONAHOE.

The jury heretofore duly impannelled, tried, and sworn in this cause sat together and heard the conclusion of the arguments of counsel, and under instructions from the court and without leaving their panel say, upon their oath, that the defendant, Michael Donahoe, is guilty of unlawfully withholding the lands and premises described in the plaintiff's declaration, and that the said plaintiff is well entitled to hold the same in fee as it hath alleged, and they assess the damages of the said plaintiff on occasion thereof at the sum of six cents.

And on motion of defendant and by counsel of plaintiff it is ordered that three months be allowed defendant to prepare and present for signature a bill of exceptions in this cause, and that all further proceedings therein be stayed until expiration of that time.

And it is further ordered that the said parties, plaintiff and defendant, refrain from committing any waste, by cutting timber or otherwise, during the period aforesaid, and if this cause shall be removed to the Supreme Court then until the decision thereof, unless otherwise ordered by this court or a judge thereof.

13–17 (Opinion and charge of the court and Exhibits A & B—maps—omitted here in printing, per stipulation. See printed Record in Cunningham case, No. 205, Oct. term, 1893, pp. 41 and 42.)

18 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Plaintiff,
vs.
MICHAEL DONAHOE, Defendant.

Bill of Exceptions.

19 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Northern Division of the Western District of Michigan.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
vs.
MICHAEL DONAHOE.

At a session of said court held at the court-room of said court, in the city of Marquette, in said district, on the 23rd day of July, A.

D. 1890, before the Honorable Henry F. Severens, district judge of said western district of Michigan, presiding, and the Honorable George R. Sage, district judge of the southern district of Ohio, associated with said presiding judge, sitting in the circuit court, the issue joined between the parties in the above-entitled cause came on to be tried by a jury of said district, for that purpose duly impaneled, at which day came the said plaintiff and the said defendant, by their respective attorneys, and the jurors of the jury aforesaid, who were then and there duly sworn to try the issue aforesaid, said cause, by agreement of parties in open court and by the order of the court, being brought on for trial at the same time and before the same jury with two other actions of ejectment between said plaintiff as plaintiff and one Walter A. Cunningham as defendant and one Hugh Finan as defendant.

And the said plaintiff's counsel, to maintain and prove the issue on the part of the plaintiff, introduced and read in evidence
20–22 a certified copy from the General Land Office of the United States of supplemental list number four (4) of lands selected by the agent of the State of Michigan, in the district of lands subject to sale at Marquette, granted to the State of Michigan by act of Congress approved July 3d, 1866, which list contained the descriptions of 23,398.14 acres of land in odd-numbered sections in the upper peninsula of Michigan; and the following is a copy of said list, together with the caption, certificates, and approval thereof, except that the descriptions of land, no part of which were involved in these suits, are omitted from the following copy, to wit:

(See Cunningham Record, p. 43.) ✱

23 Said plaintiff's counsel further offered and read in evidence a transcript of the articles of incorporation of the Portage Lake and Lake Superior Ship Canal Company, duly certified from the office of the secretary of state of the State of Michigan, showing the due incorporation of said company on the 15th day of
24–30 July, A. D. 1864, under and in accordance with the act of the legislature of the State of Michigan entitled "An act to provide for the formation of companies to construct canals or harbors and improve the same," approved March 13th, A. D. 1861, and also a transcript of amended articles of said corporation, duly certified from the office of the secretary of state of the State of Michigan, by which amended articles, on the 29th day of April, A. D. 1871, the name of said corporation was changed to the "Lake Superior Ship Canal, Railroad and Iron Company."

Said plaintiff's counsel further offered and read in evidence a transcript of the articles of incorporation of the Lake Superior Ship Canal, Railway and Iron Company, duly certified from the office of the secretary of state of the State of Michigan, of which the following is a copy:

(See Cunningham Record, p. 45.)

31–37 Said plaintiff's counsel further offered and read in evidence a transcript of amended articles of association of the

Lake Superior Ship Canal, Railway and Iron Company, duly certified from the office of the secretary of state of the State of Michigan, of which the following is a copy:

(See Cunningham Record, p. 49.)

38 Counsel for defendant objected to the introduction of said articles for the reason that there was no statute of the State of Michigan authorizing a company to be organized in accordance with such articles.

Objection overruled by the court and exception taken by counsel for defendant.

Said plaintiff's counsel further introduced in evidence a transcript of the record of a certain cause (which was admitted by defendant's counsel to be a correct transcript thereof) formerly pending and determined in the circuit court of the United States for the eastern district of Michigan, in equity, wherein Thomas N. McCarter, trustee, a citizen of the State of New Jersey, was complainant, and

39 The Lake Superior Ship Canal, Railroad and Iron Company, a citizen of the State of Michigan; The Union Trust Company, a citizen of the State of New York, and George Jerome and Fernando C. Beaman, citizens of the State of Michigan, as assignees in bankruptcy of the Lake Superior Ship Canal, Railroad and Iron Company, were defendants. Said cause was commenced by bill filed in said court by said complainant on the third day of July, A. D. 1872, for the purpose of foreclosing a mortgage upon the lands, land grants, and other property of said Lake Superior Ship Canal, Railroad and Iron Company, which mortgage is described in the decree of said court rendered in said cause, hereinafter set forth. Said record contained the deposition of George S. Frost, referred to in said decree hereinafter set forth, and attached to and as exhibits and forming a part of said deposition were lists of lands selected by the agent of the State of Michigan, certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior, containing descriptions of two hundred thousand acres of land selected under and in accordance with the act of Congress approved March third, 1865, entitled "An act granting land to the State of Michigan to aid in building a harbor and ship canal at Portage lake, Keweenaw Point, Lake Superior," and two hundred thousand acres of land selected, certified, and approved as aforesaid under and in accordance with an act of Congress approved July 3d, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage lake, Keweenaw Point, Lake Superior, in said State," all of which lands were situated

40–58 in the upper peninsula of Michigan. Among said lists was the list of lands approved by the Secretary of the Interior May 22, 1871, a copy of which (omitting descriptions of lands not involved in these suits) is hereinbefore set forth and designated "supplemental list No. 4."

All said lists were certified and approved in like manner as the list hereinbefore set forth.

It was conceded on the part of the defendants that such proceedings were had in said circuit court of the United States for the eastern district of Michigan in the suit aforesaid as to give said court jurisdiction to proceed to hear said cause and to make the decree thereon contained in said record and hereinafter set forth; and it was also admitted on the part of said defendants that all the statements of fact contained in said decree are true.

The decree made by said court in said foreclosure suit, which formed a part of said record so introduced in evidence, was as follows:

(See Cunningham Record, p. 54.)

59–108 Said plaintiff further introduced in evidence a certified transcript of a decree of the circuit court of the United States for the eastern district of Michigan, of which a copy is hereinafter set forth, and it was admitted on the part of the defendants that prior to the rendition of said decree the proper proceedings had been taken in the several causes therein entitled to confer jurisdiction upon said court to make said decree, and that the statements set forth in said decree are correct and true.

Said plaintiff's counsel also introduced in evidence a certified copy of the master's report of sale under said decree, which was attached to the transcript of decree and certified together with said decree. The following is a copy of said decree and of the master's report of sale and the certificate of the clerk of said court attached thereto:

(See Cunningham Record, pp. 65 to 91.)

109 To the introduction of the foregoing record and proceeding in said court counsel for defendant objected as being immaterial, and for the further reason that the mortgage therein mentioned antedates the certification of the land to the canal company.

The court overruled the objection, and counsel for de-
110–120 fendant took an exception.

Plaintiff's counsel further introduced in evidence three deeds of conveyance, of which the following are copies, to wit:

(See Cunningham Record, pp. 91 to 97.)

121 It was further shown that these deeds were duly recorded in the office of register of deeds of Marquette county, wherein said lands were situated, on the 21st day of August, 1879.

Counsel for defendant objected to the introduction of said last two deeds as being immaterial. The court overruled the objection and counsel for defendant took an exception.

122–124 Plaintiff's council further introduced in evidence a transcript of the certificate of the governor of the State of Michigan to the completion of the Portage Lake and Lake Superior

ship canal, duly certified by the secretary of state of the State of Michigan, of which the following is a copy:

(See Cunningham Record, p. 98.)

125–129 Plaintiff's counsel also introduced evidence that a duplicate of said certificate was duly filed with the register of deeds for the county of Houghton at about the time of the filing thereof with the secretary of state.

Plaintiff's counsel further introduced in evidence the certificate of the governor of the State of Michigan, dated November 29, 1873, together with the report of Charles E. Holland, Samuel Wright, and John H. Forster upon the subject of the completion of said canal, of which the following are copies:

(See Cunningham Record, p. 99.)

130–132 Counsel for defendant objected to the introduction of said certificate and accompanying documents as being immaterial.

The court overruled the objection and counsel for defendant took an exception.

(Testimony of Beals, McColeman, & Armstrong omitted here in printing. See Cunningham Record, p. 102.)

133 Plaintiff also introduced evidence tending to show that it had paid taxes on lands certified to it in the limits of the O. & S. line grant sixteen thousand nine hundred and fourteen dollars and twenty-six cents, and on the land in question eighty-two dollars and eighty-three cents. Defendant objected to the reception of such evidence as being immaterial.

The court overruled the objection and defendant's counsel took an exception.

It was admitted on the part of the defendant that he was in the actual possession of the premises in controversy, claiming the right of possession at the date on which the suit against him was commenced.

134 Defendant's counsel, to maintain and prove the issue on the part of the defendants, offered in evidence the order of the governor of the State of Michigan, dated October 4th, 1867, of which the following is a copy:

(See Cunningham Record, p. 104.)

135 & 136 Defendant's counsel further gave evidence to show that the Ontonagon and State Line Railroad Company became incorporated under the laws of the State of Michigan, August 20th, 1856, and that the Marquette and State Line Railroad Company was incorporated under the laws of said State on the 16th day of January, 1857. It also appeared from said evidence that neither of these corporations surveyed any line or filed any map; that they were skeleton companies, organized to receive from the State the grant

of lands made by act of Congress approved June 3, 1856, granting lands for the construction of lines of railroad from Marquette and Ontonagon to the Wisconsin State line.

Defendant's counsel further offered in evidence a letter from the Commissioner of the General Land Office, dated December 3d, 1857, of which the following is a copy:

(See Cunningham Record, p. 104.)

137 & 138 In connection with the above offer, defendant's counsel called attention to the act of Congress approved June 3rd, 1856, granting lands to the State of Michigan to aid in the construction of certain railroads, and the above offer was made as one step in the chain of evidence to be offered for the purpose of showing that the lands involved in this suit were embraced in said railroad grant, and that the title thereto did not pass to the plaintiff under the grant for the construction of the Portage Lake and Lake Superior ship canal.

Evidence was also offered to show that the route of the railroad from Ontonagon to the State line was accepted by the Secretary of the Interior April 7th, 1858.

Defendant's counsel further offered in evidence a copy, duly certified from the General Land Office, of a survey of a railroad line from Marquette and Ontonagon to the State line, filed by the Chicago, St. Paul and Fond du Lac Railroad Company, copy of which is hereto annexed, marked Exhibit A.

Defendant's counsel further offered in evidence a certificate of the Commissioner of the General Land Office, approved by the Secretary of the Interior, which accompanies a list of lands certified to the State of Michigan to aid in the construction of a railroad from Marquette to the Wisconsin State line, of which the following is a copy—attached to said certificate was a list of land- embracing 112,145.38 acres:

(See Cunningham Record, p. 106.)

139–141 Defendant's counsel further offered in evidence a certified list of lands, approved by the Secretary of the Interior, containing a total of 142,430.23 acres, of which the following is a copy, omitting all descriptions of land:

(This list embraced the tracts involved in the two suits tried with this case, but not the tract involved herein.)

(See Cunningham Record, p. 106.)

142 Defendant's counsel further offered in evidence a certified list of lands, containing 41,649.25 acres, embracing the land involved in this suit, of which the following is a copy, omitting the descriptions of the other lands:

Certified list — land granted in the six-miles limit of Ont. and State line and Mar. and S. L., where they intersect.

Approved Dec. 12th, 1861.

List No. 20.

Completed and checked with list of relinquishment by governor and company. Filed July 9th, 1868. T. C.

Ex'd July 11th, 1868.

Posted —— 12th, 1861. J. V. P.

Chicago, St. Paul and Fond du Lac railroad, where the two branches to Marquette and Ontonagon intersect and cross each other.

143 List of lands in the district of lands subject to sale at Marquette, within the six-mile limits, granted to the State of Michigan by the act of Congress approved the 3d June, 1856, entitled "An act granting public lands in alternate sections to the State of Michigan to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for six sections in width on each side of the railroad," from Marquette and Ontonagon to the Wisconsin State line, where the two branches of said road intersect and cross each other.

North of base line and west of — principal meridian. Chicago, St. Paul and Fond du Lac railroad, where the two branches from Marquette and Ontonagon intersect and cross each other.

Six-miles Limits, Railroad List, Marquette District, Michigan.

No.	Parts of section.	Section.	Township.	Range.	Acres.	Remarks.
*	* * *	*	*	*	*	*
	W. ½ N.W. ¼ & N.W. ¼ S.W. ¼	23	43	35	120	
*	* * *	*	*	*	*	*

General Land Office, *December 10th*, 1861.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to six, inclusive, is a true and correct list of the tracts of land within the six-
144 miles limits granted to the State of Michigan by the act of Congress approved 3d June, 1856, entitled "An act making a grant of alternate sections of the public lands of the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," being the vacant and unappropriated lands in the alternate sections designated by odd numbers for six sections in width on each side of that part of the grant by said act of June 3d, 1856, to the State of Michigan to aid in the construction of railroads from Marquette and Ontonagon to the Wisconsin State line, and known as the Chicago, St. Paul and Fond du Lac railroad, where the two branches of said road intersect and cross each other, being also the vacant and unappropriated lands in the alternate sections designated by odd numbers of the granted sections in place within the six-mile reserves within the State of Michigan, and they are now submitted for the approval of the Secretary of the Interior

in accordance with the requirements of said act of 3d June, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first hereinabove written.

J. M. EDMUNDS,
Commissioner.

DEPARTMENT OF THE INTERIOR, *December 12th*, 1861.

Approved, subject to conditions and rights above mentioned.
CALEB B. SMITH, *Secretary.*

145 Defendant's counsel further offered in evidence a letter of the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated May 29th, 1873, ordering the restoration of certain lands to market, of which the following is a copy (omitting the descriptions of land).

146 & 147 And said defendant's counsel offered in evidence in connection with said order of restoration a telegraphic countermand of said order dated July 30th, 1873, of which a copy is given following said notice of restoration :

(See Cunningham Record, p. 110.)

148–154 Defendant's counsel also offered in evidence the report of the Secretary of the Interior to the Speaker of the House of Representatives, dated March 11th, 1878, of which the following is a copy :

(See Cunningham Record, p. 111.)

155–161 Defendant's counsel further introduced in evidence certain letters of the Commissioner of the General Land Office, addressed to the register and receiver of the land office at Marquette, Michigan, of which the following are copies :

(See Cunningham Record, p. 115.)

162–170 Defendant's counsel also offered in evidence a statement compiled from the records of the United States Land Office of lands entered by various parties from June 4th, 1856, to November 1st, 1880, within the six-miles limits of the Ontonagon and State Line railroad, in odd-numbered sections, amounting to 46,130 acres, including lands certified to the State May 19th, 1871, to aid in the construction of the Portage Lake and Lake Superior ship canal.

Defendant's counsel also introduced in evidence a letter of the Commissioner of the General Land Office addressed to the Secretary of the Interior, dated January 5th, 1881, of which the following is

a copy, including in said letter a letter from Joseph S. Wilson to P. J. Avery, dated October 6th, 1869:

(See Cunningham Record, p. 118.)

171–178 Also a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated October 20th, 1881, of which the following is a copy:

(See Cunningham Record, p. 123.)

179 Also a letter from the Commissioner of the General Land Office to the Honorable J. G. Southerland, dated May 23, 1872, of which the following is a copy:

(See Cunningham Record, p. 127.)

180–188 Also the report of the Committee on Public Lands to the Senate of the United States, dated January 20th, 1881, of which the following is a copy:

(See Cunningham Record, p. 128.)

189 & 190 Also a letter from the governor of the State of Michigan to the Secretary of the Interior, dated July 10, 1873, of which the following is a copy:

(See Cunningham Record, p. 132.)

191–199 Defendant's counsel further introduced in evidence the record of certain action taken by the board of control of railroad grants in the State of Michigan, of which the following is a copy:

(See Cunningham Record, p. 133.)

200 Defendant's counsel also introduced in evidence articles of consolidation, dated October 21st, 1864, between the aforesaid Chicago and Northwestern Railway Company and the aforesaid Peninsula Railroad Company, whereby the said two corporations became and were duly consolidated into one corporation under and by virtue of the laws of the State of Michigan, to be known as the Chicago and Northwestern Railway Company; and among the provisions of said articles of consolidation were the following:

(See Cunningham Record, p. 138.)

It was admitted on the part of the plaintiff that the Chicago and Northwestern Railway Company, as consolidated with the Peninsula Railroad Company, changed the route of the line of railroad from Marquette to the State line, as authorized by the joint resolution of Congress dated July 5, 1862, and constructed its route upon such changed line from Marquette to the mouth of the Menominee river and received lands therefor along or near the new line and

outside of the limits of the line surveyed from Ontonagon to the State line.

Defendant's counsel further offered in evidence the articles of incorporation of the Ontonagon and Brule River Railroad
201–206 Company, showing the incorporation of said company under the railroad laws of the State of Michigan, September 10, 1880.

Defendant's counsel further introduced in evidence the record of the proceedings of the board of control of railroad lands for the State of Michigan and of the acceptance of the Ontonagon and Brule River Railroad Company, of which the following are copies:

(See Cunningham Record, p. 139.)

207 The defendant testified in his own behalf as follows:

I reside on the west half of the northwest quarter and the northwest quarter of the southwest quarter, section 23, town. 43 north, range 35 west. I first went into actual possession of this land Feb'y 25th, 1883. Before going into possession I made some inquiry as to status of land, but not much. They said it belonged to the Government, and that I had a right to settle on it. Acting on that belief, I built my first house, which was 10 x 11, and chopped down some trees. There was about four feet of snow when I made my first improvements. Just as soon as the snow went off I cleared off about three acres. I planted about twelve bushels of potatoes and some garden stuff. I have lived continuously on that land ever since. A little over a year after I built another house on this land. In size it was 15 x 22, built of logs, and in which I now live. I cleared right along, and I have now ten acres under cultivation and three acres more chopped. I have grown crops on the land every year. The usual kind—hay, oats, wheat, potatoes, and garden vegetables. I have also erected a barn upon the premises; size, 24 x 42; have had some stock upon the premises—two cars. My improvements are all fenced. I am not married. The character of the land and timber are good. The timber is soft and hard wood—pine, maple, elm, basswood, hemlock, balsam. The soil is sandy loam, with clay subsoil. I made my first application for this land under the pre-emption laws in March, 1883. It was rejected, and I took an appeal to Washington.

208 Witness, on cross-examination, testified as follows:

I came to this land from Manitowoc, Wisconsin. I was then 23 years of age. I was born in Wisconsin. My father was a farmer and I worked with him. I never owned any land before settling upon this. I heard around the town of Iron River that this was public land. I also heard that it was a grant to the Brule River & Ontonagon railroad, and that there was to be an act of Congress forfeiting the grant. Everybody thought it was going to revert back to the Government, so I thought I would have a chance to make a home of it. I didn't understand that the grant had already

been forfeited, but that it probably would be forfeited and if I settled on it I would have a chance to get it. I sent in my application for this land by John Wymer. He told me he thought it was all right. I did not go to the land office myself then. That application was rejected. Wymer told me about it. He told me that he had appealed it to Washington; don't think Wymer told me why it was rejected. I did not see the rejection; heard some talk around town that the canal Co. made claim to this land, but not much until the papers in this suit were served upon me. There was a man came to my house once and wanted to run me off altogether. I could not say what his name was. He said he was one of the canal Co.'s cruisers, but I did not know who in the world the canal Co. was. He said the canal Co. claimed the land. Wymer sent my application by mail. I started to build my first house Feb'y 25th, 1883. There was between three and four feet of snow. We shoveled down to the ground to put in the logs. There was a road cut out through the woods from Iron River to this land; it
209 had been traveled by teams. Iron River village was about a mile and a quarter from this land. I went over this land before picking it out. The man told me that put me on, "He says you will be foolish if you don't go on that land; somebody will go on it." I said all right. I don't know the quantity of pine timber on this land; never estimated it; have never been over all of it. I could not say whether it was good pine land or not. I never worked in the woods over three months in my life; then I cooked in camp. I never had any estimate of the pine on the land; could not say whether there was more pine than maple. I took this land because I wanted to make a home for myself. I did not take the land because there was a good deal of pine on it, but I cared for the pine. My house is on the northwest of the southwest, within three or four rods of the south line. As early as 1885 and 1886 I knew that the canal Co. claimed this land. I also understood it was a railroad grant up to March, 1889. The only railroad grant that I heard of was the Ontonagon & Brule River.

It was conceded by counsel for plaintiff that the records of the local land office showed that defendant made his first application for this land April 11, 1883; that it was rejected by the local office at that date as being in conflict with canal selection; that defendant took an appeal to the Commissioner of the General Land Office, which is still pending in the departments; that on May 1st, 1889, he renewed his application and it was rejected by the local office on the ground that he had an appeal still pending for the same land, and that defendant took an appeal from such rejection.

210 Defendant's counsel further introduced in evidence a letter from the commissioner of the land office of the State of Michigan, of which the following is a copy:

(See Cunningham Record, p. 147.)

It was admitted by defendant's counsel that said letter related to indemnity lands selected by the State of Michigan in lieu of

other State lands which had been sold by the United States, and did not relate to these particular lands.

It was further conceded by counsel for respective parties
211 that neither Ontonagon and State Line Railroad Company or any other railroad company organized for that purpose ever built any part of the line of the Ontonagon and State Line Railroad Company; that no railroad was ever built upon that line until the year 1880, and then only twenty miles, commencing at the mouth of the Ontonagon river and extending southerly from that point, not reaching anywhere near the land in question, which was built by the Ontonagon and Brule River Railroad Company; that the title of said company to said land was repudiated by the Government and said company never succeeded in getting any of the land embraced in said grant, and that the grants for the Ontonagon and State Line Railroad Company were never earned by any railroad company.

Defendant's counsel further offered to show that the plaintiff in this case has not nor has any of the corporations from which it claims title to these lands ever constructed or operated any railroad under its charter; that the only franchise it has exercised has been the construction and operation of the canal through Portage lake, and that the lands in question are not used by the corporation in connection with that business, but are simply held by the corporation.

Defendant's counsel stated the object of said testimony to be for whatever effect — might have upon this "trifold corporation" (referring to the plaintiff), and also under the constitutional provision of the State of Michigan which prohibits a corporation from holding lands for a period of over ten years unless in connection with their business and necessary to their franchises.

212 & 213 Plaintiff's counsel admitted that as matter of fact neither the plaintiff nor any of its predecessors had ever constructed any railroad under its charter, and that the lands in question were not used in connection with the operation of its canal.

Rebuttal.

Plaintiff's counsel, by way of rebuttal, introduced in evidence a release executed by the Peninsula Railroad Company to the United States, of which the following is a copy:

(See Cunningham Record, p. 148.)

214 Counsel for defendant objected to the introduction of said release as immaterial and for being ambiguous and uncertain.

The objection was overruled by the court and counsel for defendant took an exception.

Plaintiff's counsel further introduced in evidence articles of agreement and other documentary evidence showing the consolidation of the Ontonagon and State Line Railroad Company and the Mar-

quette and State Line Railroad Company, hereinbefore mentioned, with the Chicago, St. Paul and Fond du Lac Railroad Company, a corporation of the States of Illinois and Wisconsin, whereby said three companies became consolidated into one corporation under the name of the Chicago, St. Paul and Fond du Lac Railroad Company, and whereby all rights, franchises, lands, and land grants and property of every description belonging to either of said orig-
215 inal corporations became and were vested in said consolidated corporation, pursuant to the laws of the States of Michigan, Wisconsin, and Illinois.

Plaintiff's counsel also introduced in evidence the record in the office of the register of deeds of the proper county of a mortgage executed by the Chicago, St. Paul and Fond du Lac Railroad Company, being the corporation formed by the consolidation of the three corporations last above mentioned, to William A. Booth, James A. Lanier, and William B. Ogden, as trustees, bearing date the 6th day of April, 1857, to secure the payment of certain bonds issued by said corporation. Said mortgage recited the consolidation of the three corporations above named under the name and style of the Chicago, St. Paul and Fond du Lac Railroad Company, and the vesting in said corporation of all the property, rights, and franchises of said three original corporations; also recited, among other things, the grant of lands to the State of Michigan under the act of Congress approved July 3, 1856, and the act of the legislature of the State of Michigan, approved February 14th, 1857, conferring said grant upon the Marquette and State Line Railroad Company and said Ontonagon and State Line Railroad Company, and the fact that all rights of both said companies in said land grant had become vested in the consolidated company by the consolidation aforesaid, and purported to convey to said trustees, as joint tenants, as security for said bonds, and their survivors and successors in the trust therein created, the "entire railroad of said company from the city of Chicago through the cities of Janesville and Fond du Lac to Lake Superior, with two termini on said lake, one at or near Marquette, or the mouth of Carp river, and the other at or near Ontonagon, or the mouth of the Ontonagon river,
216 being a direct line between Chicago and said Marquette and Ontonagon, whether said lines be called and known as the main trunk lines or some of them as branches to the main trunk line;" and also all other real and personal property of said corporation.

Said mortgage conveyed as security for said bonds by express stipulation therein "all the right, title, interest, claim, or demand which the said party of the first part has or hereafter shall acquire in or to one million acres of public lands of the United States situated, lying, and being in the States of Wisconsin and Michigan, adjoining and adjacent to the above-described railroad and branches between Fond du Lac, or Lake Winnebago, and Ontonagon and Marquette, on Lake Superior, as hereinbefore described, being parts and parcels of the lands which were granted to the States of Wisconsin and Michigan by the aforesaid act of Congress approved

June 3, 1856, and by the States of Wisconsin and Michigan granted to the assignors and predecessors of the party of the first part, and subsequently by consolidation conferred upon, assigned to, and confirmed to the party of the first part, as hereinbefore stated."

And said mortgage provided for the taking possession by the trustees in case of default and for the sale, and empowered the trustees and their successors to sell all said mortgaged property at public auction upon notice therein prescribed.

Said plaintiff's counsel also introduced in evidence the record of a deed from said trustees, dated June 2, 1859, to Samuel J. Tilden and Ossian D. Ashley, which deed recited the aforesaid mortgage, the issue of bonds thereunder and default thereof, the giving of notice of sales prescribed by said mortgage, and the sale of
217 all the property mentioned in said mortgage at public auction, at the city of Janesville, on said 2d day of June, 1859, in accordance with the power of sale contained in said mortgage, for the sum of forty thousand dollars, and purported to convey to said Samuel J. Tilden and Ossian D. Ashley all the property described in said mortgage, including all the rights of said Chicago, St. Paul and Fond du Lac Railroad Company in and to the lands embraced in the land grants above mentioned.

The plaintiff's counsel also introduced in evidence the record of a deed bearing date the first day of July, 1859, from Samuel J. Tilden and Ossian D. Ashley, above named, to the Chicago and Northwestern Railway Company. Said deed recited the purchase by said Tilden and Ashley under the mortgage sale and deed aforesaid, and recited the fact that the said Chicago and Northwestern Railway Company was a corporation duly formed and organized in pursuance of the act of the State of Wisconsin, entitled "An act to facilitate and authenticate the formation of a corporation by the purchasers of the Chicago, St. Paul and Fond du Lac Railroad Company," approved March 14th, 1859, and of the laws of the State of Wisconsin, and is a " corporation duly formed and organized in pursuance of the act of the State of Illinois entitled 'An act to authorize the sale of the Chicago, St. Paul and Fond du Lac Railroad Company and to enable the purchasers thereof to form a corporation,' approved February 19th, 1859, and of the laws of the State of Illinois, and purported to convey to the said Chicago and Northwestern Railway Company all the lands, land grant, rights, franchises, and other property conveyed to them by the trustees under said mortgage as aforesaid."

218 Plaintiff's counsel also introduced in evidence the record of a deed dated June 30, 1859, made by the aforesaid Chicago, St. Paul and Fond du Lac Railroad Company, named therein as a corporation existing under and by virtue of the laws of the State of Illinois, Wisconsin, and Michigan, to Samuel J. Tilden and Ossian D. Ashley, which deed recited the execution of the mortgage aforesaid, referring thereto by date and place of record, reciting the default in the condition of said mortgage, and the sale by the trustees therein named on the 2d of June, 1859, under the power of sale contained in said mortgage, of all the lands, hereditaments, prop-

erty, franchises, rights, and things in the said deed described and mentioned, and the conveyance thereof by said trustees to said Tilden and Ashley; also reciting the organization of the Chicago and Northwestern Railway Company as hereinbefore stated, and that said grantees, said Tilden and Ashley, were about to convey said railway, property, franchises, rights, and things to the said corporation; and therefore, in consideration thereof and of one dollar, the said Chicago, St. Paul and Fond du Lac railroad did grant, bargain, sell, remise, release, and convey unto said Tilden and Ashley all the property, rights, and franchises mentioned and set forth in said mortgage, including all rights of the said Chicago, St. Paul and Fond du Lac Railroad Company in and to the land grants in the States of Michigan and Wisconsin above mentioned.

To the introduction in evidence of which mortgage and deeds counsel for defendant objected as being immaterial, and that no authority had been shown to warrant their execution, and that they were void.

The court overruled the objection and counsel for defendant took an exception.

Plaintiff's counsel further introduced in evidence a certified list of lands, certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior, to the State of Michigan, containing 32,305.93 acres within the six-miles limits of the Chicago, St. Paul and Fond du Lac railroad (being the
219–222 Ontonagon branch) and the Marquette and Ontonagon railroad, where they intersect and cross each other.

Plaintiff's counsel further introduced in evidence a release from the Chicago and Northwestern Railway Company to the State of Michigan, of which the following is a copy:

(See Cunningham Record, p. 151.)

223–226 Plaintiff's counsel further introduced in evidence a release from the governor of the State of Michigan to the United States, dated May 1st, 1868, of which the following is a copy:

(See Cunningham Record, p. 154.)

227 Counsel for defendant objected to the introduction in evidence of said release, as the governor had no authority to release any lands in the six-miles limit of the O. & State Line railroad.

The court overruled the objection, and defendant's counsel took an exception.

Plaintiff's counsel also introduced in evidence a letter from James H. Howe, solicitor of the Chicago and Northwestern Railway Company, to the Commissioner of the General Land Office, dated July 9, 1868, of which the following is a copy:

(See Cunningham Record, p. 156.)

228 Also a letter from the Commissioner of the General Land Office to James H. Howe, solicitor, etc., of which the following is a copy:

(See Cunningham Record, p. 156.)

229 Also a letter from said James H. Howe to the Commissioner of the General Land Office, of which the following is a copy:

(See Cunningham Record, p. 157.)

230–231 Also two letters from the Commissioner of the General Land Office to said James H. Howe, of which the following are copies:

(See Cunningham Record, p. 157.)

232–234 Plaintiff's counsel further introduced in evidence a release from the Chicago & Northwestern Railway Company to the State of Michigan, dated June 17th, 1870, of which the following is a copy:

(See Cunningham Record, p. 158.)

235 & 236 Plaintiff's counsel further introduced in evidence a communication of the attorney general of the State of Michigan to the governor of said State, dated February 20, 1870, of which the following is a copy:

(See Cunningham Record, p. 160.)

237–240 Plaintiff's counsel also introduced in evidence a release from the governor of the State of Michigan to the United States, dated August 14th, 1870, of which the following is a copy:

(See Cunningham Record, p. 161.)

241–243 Plaintiff's counsel asked counsel for defendant to admit that the release made by the Peninsula Railroad Company May 16th, 1863, hereinbefore mentioned, was the release referred to in the preamble of the joint resolution of the legislature of the State of Michigan, approved February 21st, 1867, which they declined to do.

Defendant's counsel then proposed to send for a witness to show a careful search in the proper offices for any other release made prior to the date of said joint resolution.

By the COURT: It would seem, in the absence of any proof of any other release and with the proof that the Chicago & Northwestern was the successor by consolidation of the Peninsula Company, that this resolution of the legislature of Michigan would have to be construed as referring to that release by the Peninsula Railroad Company, and we should be obliged to say that it was a misrecital, but still with all these circumstances before us we must assume that that was the one that was meant.

Judge DILLON: I am willing to let it rest on the basis that the court puts it. We are at liberty to produce such a paper, if it exists, and the other side if they can find it.

The COURT: The case is so much a question of law that perhaps no injustice would be done if we should leave that question open to be supplemented by proof on that point on either side.

Judge MARSTON: If any important document is omitted by either party, that they have the right to add it to this record in making up the bill of exceptions.

(The foregoing colloquy between counsel and the court is inserted in the bill of exceptions under protest of defendant's counsel.)

Plaintiff's counsel further introduced in evidence two letters from the Commissioner of the General Land Office to Horace J. Frost, dated January 18th & 19, 1881, of which the following are copies:

(See Cunningham Record, p. 163.)

244–246 Plaintiff's counsel also introduced in evidence a copy of a bill introduced in the Senate of the United States January 10, 1881, being Senate bill 1997, and the bill referred to in the report of the Committee on Public Lands, introduced in evidence by defendant's counsel. The following is a copy of said bill:

(See Cunningham Record, p. 165.)

247 Plaintiff's counsel also introduced a copy, duly certified from the General Land Office, of the map of survey of the Chicago, St. Paul and Fond du Lac railroad, from Fond du Lac, Wisconsin, northerly to the State line, meeting the Michigan line thereof, together with the certificates indorsed on said map. Copy of said map, with the certificates endorsed thereon, is hereto annexed, marked Exhibit B.

Counsel for defendant objected to the introduction of said map as immaterial. The court overruled the objection, and counsel for defendant took an exception.

Plaintiff's counsel also introduced in evidence a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated May 2, 1866, of which the following is a copy:

(See Cunningham Record, p. 167.)

248 Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated December 6th, 1869, of which the following is a copy:

(See Cunningham Record, p. 167.)

249 Also a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated August 8th, 1874, of which the following is a copy:

(See Cunningham Record, p. 168.)

250 Also a letter from the Secretary of the Interior to the governor of the State of Michigan, dated August 15, 1874, of which the following is a copy:

(See Cunningham Record, p. 168.)

251 Also a letter from the Commissioner of the General Land Office to the Secretary of the Interior, dated February 4, 1878, of which the following is a copy:

(See Cunningham Record, p. 169.)

252 & 253 Also a communication from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated March 19, 1888, of which the following is a copy, so far as material to this case:

(See Cunningham Record, p. 169.)

254 Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated July 16, 1880, of which the following is a copy:

(See Cunningham Record, p. 170.)

255 Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated August 11, 1880, of which the following is a copy:

(See Cunningham Record, p. 171.)

Also a letter from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated March 25, 1890, of which the following is a copy, omitting all names of claimants and descriptions of lands except that of Walter A. Cunningham, the defendant in this suit:

(See Cunningham Record, p. 171.)

256 & 257 Also a copy of the decision of the Secretary of the Interior, referred to and inclosed in the last-mentioned letter, of which the following is a copy:

(See Cunningham Record, p. 172.)

258 Counsel for defendant objected to the introduction of said letter and accompanying decision as being of a date subsequent to the commencement of suit.

The court overruled the objection and defendant's counsel took an exception.

Also a communication from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated Sept. 11, 1888, of which the following is a copy:

(See Cunningham Record, p. 172.)

259–266 Plaintiff's counsel also introduced in evidence a communication from the Commissioner of the General Land Office to the register and receiver at Marquette, Michigan, dated September 29, 1887, of which the following is a copy:

(See Cunningham Record, p. 174.)

267 & 268 Plaintiff also introduced evidence showing that the value of the premises in controversy was $7,500.00. It was also conceded by the plaintiff that P. J. Avery, who was appointed by the governor of Michigan an agent to select lands under the canal grant, was at the time of his appointment and at the time of the selection of the land president of the Portage Lake and Ship Canal Company.

Plaintiff's counsel also introduced in evidence a certain list of lands disposed of by the Government at private entry in the even-numbered sections and odd-numbered sections within the six-miles limit of the aforesaid railroad from Ontonagon to the Wisconsin State line, showing the names of purchasers, date of sale, and date of patent in cases in which patent had been issued from the year 1867 to 1889, both inclusive. Said list of lands show- the number of acres sold and the number of acres patented in each year during said period, as shown by the following table, to wit:

(See Cunningham Record, p. 178.)

269 Plaintiff also introduced evidence to show that the land certified to the Chicago and Northwestern Railroad Company along the new route from Marquette to the State line, at the mouth of the Menominee river, under joint resolution of Congress approved July 5, 1862, had been patented by the State of Michigan to the said company.

270 Defendant's counsel introduced in evidence the following letter:

(See Cunningham Record, p. 179.)

271 & 272 The foregoing contains all the evidence introduced by either party upon the trial of the aforesaid cause, and thereupon the defendant's counsel requested the said circuit court to direct the jury to find a verdict for the defendant; but the said circuit court refused to instruct the jury in accordance with said request, and to such refusal said defendant's counsel did then and there except, and thereupon the said circuit court, by the Honorable H. F. Severens, district judge, declared and delivered his opinion upon said cause as follows:

(See Cunningham Record, p. 186.)

273 & 274 And the opinion of the court, so pronounced by the Hon. H. F. Severens, was supplemented by Hon. George R. Sage as follows:

(See Cunningham Record, p. 187.)

275 And thereupon the said circuit court instructed the jury as follows:

"GENTLEMEN OF THE JURY: These several cases resolve themselves into questions of law, and there remains no question of fact to be decided by the jury. The ruling of the court upon matters of law involved has disposed of the whole subject-matter of the controversy in the several cases. Nevertheless, the jury being here, it is necessary to take a formal verdict.

The court instructs you that upon the law of this case,
276 speaking now of the Donahoe case, your verdict should be for the plaintiff."

Defendant's counsel then and there excepted to the said instruction of the court directing the jury to render a verdict in favor of the plaintiff.

Thereupon, under the instruction of the court aforesaid, the said jury immediately returned a verdict against the defendant and in favor of said plaintiff.

And because none of the exceptions so made appear on the record of said trial, on the request of said defendant's counsel, the said district judge of the western district of Michigan, who presided at said trial, has settled and signed this bill of exceptions this 30th day of September, A. D. 1890.

H. F. SEVERENS,
District Judge.

(Filed Sept. 30, 1890.
F. M. MOORE,
Dep. Clerk.)

277 (*Petition for Writ of Error. Filed Sept.* 30, 1890. *F. M. Moore, Dep. Clerk.*)

UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Northern Division of the Western District of Michigan.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Plaintiff,
vs.
MICHAEL DONAHOE, Defendant.

To the Honorable Henry F. Severens, judge of the circuit court of the United States for the said district:

Now comes Michael Donahoe, by Vosper Brothers, his attorneys, and complains that in the record and proceedings, and also in the rendition of judgment in a suit between The Lake Superior Ship Canal, Railway and Iron Company, plaintiff, and Michael Donahoe, defendant, in a plea of ejectment tried in the circuit court of the United States for said northern division of the western district of Michigan, at the May term thereof, A. D. 1890, and in which judgment was rendered against the said defendant and in favor of

said plaintiff on the twenty-sixth day of July, A. D. 1890, manifest error hath intervened, to the great damage of said defendant. Wherefore said defendant prays for a writ of error and such other proceedings as may cause the same to be corrected by the supreme court.

Marquette, September 30, 1890.

VOSPER BROTHERS,
Attorneys for Defendant.

278 *Bond. Filed Sept. 30th*, 1890. *F. M. Moore, Dep. Clerk.*

UNITED STATES OF AMERICA:

The Supreme Court.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Plaintiff,
vs.
MICHAEL DONAHOE, Defendant.

Know all men by these presents that we, Michael Donahoe, as principal, and Timothy Nester & Benjamin Vosper, as sureties, are held and firmly bound unto the above-named plaintiff in the sum of two hundred dollars, to be paid to the said plaintiff, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this thirtieth day of September, A. D. 1890.

Whereas the above-named defendant has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the above-entitled action rendered by the circuit court of the United States for the northern division of the western district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Michael Donahoe shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and effect.

MICHAEL DONAHOE. [SEAL.]
TIMOTHY NESTER. [SEAL.]
BENJAMIN VOSPER. [SEAL.]

279 UNITED STATES OF AMERICA, } ss:
Western District of Michigan, }

Timothy Nester and Benjamin Vosper, of said district, being duly sworn, do depose and say each for himself that he is worth the sum of five hundred dollars over and above all just debts and liabilities.

TIMOTHY NESTER.
BENJAMIN VOSPER.

Subscribed and sworn to before me this 30th day of September, A. D. 1890.

FRED. HEFFERMEN,
Notary Public, Marquette County, Mich.

I approve of the above bond and the sufficiency of the sureties thereto.

Dated thirtieth day of September, A. D. 1890.

H. F. SEVERENS,
District Judge.

(Seal notary public.)

280 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Charles L. Fitch, clerk of said court, do hereby certify that the annexed and foregoing is a true transcript of the records and files of the cause therein entitled; that I have compared the same with the original record and files remaining in my office, and it is a true transcript thereof and of the whole of such originals.

The original writ of error, citation, and assignment of errors are also hereto annexed.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court this thirtieth day of September, in the year one thousand eight hundred and ninety.

CHARLES L. FITCH, *Clerk,*
By F. M. MOORE, *Deputy Clerk.*

281 UNITED STATES OF AMERICA, *ss:*

To the Lake Superior Ship Canal, Railway and Iron Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at Washington on the second Monday of October, A. D. 1890, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and northern division of the western district of Michigan, wherein Michael Donahoe is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry F. Severens, district judge, acting as presiding judge of the said circuit court of the United States for said district, this thirtieth day of September, in the year of our Lord one thousand eight hundred and ninety.

H. F. SEVERENS,
District Judge.

We hereby acknowledge due service of the foregoing citation. Sept. 30th, 1890.

BALL & HANSCOM,
Attorneys for Plaintiff Below.

(Filed Sept. 30, 1890.
F. M. MOORE,
Dep. Clerk.)

282 [Endorsed:] The circuit court U. S., nor. div., western dist. Mich. Michael Donahoe, pl'ff in error, *vs.* The Lake Superior Ship Canal, Railway & Iron Company, def't in error. Citation. Vosper Bros. & Don M. Dickinson, att'ys for pl'ff in error.

283 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the northern division of the western district of Michigan, Greeting:

Because in the record and proceedings, and also in the rendition of judgment of a plea which is in the said circuit court, before you, Honorable Henry F. Severens and Honorable George R. Sage, district judges, sitting in the circuit court, between The Lake Superior Ship Canal, Railway and Iron Company, a corporation of the State of Michigan, plaintiff, and Michael Donahoe, defendant, in a plea of ejectment, manifest error hath happened, to the great damage of the defendant, as by his complaint appears, we, being willing that error, if any hath been made, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

284 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the thirtieth day of September, in the year of our Lord one thousand eight hundred and ninety.

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Northern Division of the Western District of Michigan,
By FRANCIS M. MOORE,
Deputy Clerk.

BENJ. VOSPER &
DON M. DICKINSON,
Att'ys for Pl'ff in Error.

Allowed Sept. 30, 1890.

H. F. SEVERENS,
District Judge.

WESTERN DISTRICT OF MICHIGAN, *ss:*

To the justices of the Supreme Court of the United States:

The return to this writ appears by the schedules thereunto annexed.

The answer of the judges of the circuit court of the United States for the western district of Michigan.

{ Seal of the U. S. Circuit Court, Western District of Mich., Northern Division. }

CHARLES L. FITCH,
Clerk of said Court,
By FRANCIS M. MOORE,
Deputy Clerk.

(Filed Sept. 30, 1890.
F. M. MOORE, *Dep. Clerk.*)

285 [Endorsed:] The circuit court of the U. S. for northern div., western dist. Mich. Michael Donahoe, pl'ff in error, *ads.* Lake Superior Ship Canal, Railway & Iron Company, def't in error. Writ of error. Benj. Vosper, att'ys for pl'ff in error; Don M. Dickinson, of counsel.

286 UNITED STATES OF AMERICA:

Supreme Court.

MICHAEL DONAHOE, Plaintiff in Error,
vs.
LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Defendant in Error.

Of the October term of the year of our Lord one thousand eight hundred and ninety.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Michael Donahoe, by Don M. Dickinson and Benjamin Vosper, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. In admitting in evidence the articles and amended articles of incorporation of the Lake Superior Ship Canal, Railway and Iron Company.

2. In admitting in evidence the judicial proceedings had in the United States court of the eastern district of Michigan between sundry parties.

3. In admitting in evidence the certificate of the governor of the State of Michigan and accompanying documents as to completion of canal.

4. In admitting in evidence the deed from Man and Wilson to defendant in error.

5. In admitting in evidence therein a statement as to amount of taxes paid by plaintiff upon lands in the Ontonagon and

Wisconsin State line grant and upon the lands involved in this suit.

287 6. In receiving in evidence the statement as to lands sold and patented by the General Government in the Ontonagon and Wisconsin State line grant since the certification thereof to the State of Michigan.

7. In admitting in evidence the release of the Peninsula Railroad Company to the United States.

8. In admitting in evidence the record of the mortgage from the Chicago, St. Paul and Fond du Lac Railroad Company to William B. Ogden and the trust deed made by the same party.

9. In admitting in evidence the deed of William B. Ogden and others.

10. In admitting in evidence the deeds from the Chicago, St. Paul and Fond du Lac Railroad Company to Samuel J. Tilden *et al.* and from said Tilden to the Chicago and Northwestern railway.

11. In admitting in evidence the release made by the governor of the State of Michigan of the clear lands certified to the State for the Ontonagon and Wisconsin State Line railroad.

12. In admitting in evidence the release by the governor of the State of Michigan of the lands certified to the State in the common limits of the Ontonagon and Wisconsin State Line and Marquette and Wisconsin State Line railroads.

13. In admitting in evidence the map of the Chicago, St. Paul and Fond du Lac railroad, as located in Wisconsin.

14. That said circuit court erroneously refused to instruct the jury to render their verdict for the defendant.

15. That said circuit court erroneously instructed the jury to render a verdict for the plaintiff.

There is also error in this: That by the record aforesaid it appears that the judgment aforesaid was given for the said defendant

288 in error against the said plaintiff in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiff in error and against the said defendant in error.

And the said plaintiff in error prays that the said judgment may be reversed, annulled, and altogether held for naught, and that he may be restored to all things that he has lost by occasion of the said judgment, etc.

DON M. DICKINSON &
BENJAMIN VOSPER,
Attorneys for Plaintiff in Error.

I hereby accept service of a copy of the above assignment of errors.

BALL & HANSCOM,
Att'ys for Def't in Error.

Filed Sept. 30, 1890.
F. M. MOORE, *Dep. Clerk.*

289 UNITED STATES OF AMERICA:

The Supreme Court.

MICHAEL DONAHOE, Plaintiff in Error,
vs.
LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY, Defendant in Error.

Whereas the clerk of the circuit court of the United States for the northern division of the western district of Michigan in making return to the writ of error in this cause inadvertently omitted to attach thereto and embody in said return a transcript of the entry of the final judgment therein, and has, since making return to said writ of error, transmitted to the clerk of this court a transcript of said judgment entry, certified by him—

Therefore it is hereby stipulated by and between the parties hereto that the transcript of judgment entry so certified by said clerk may be attached to his return of the writ of error in this cause or filed therewith as an addition to the record and be made a part of the record of said cause with the same effect as if the same had been originally attached to and transmitted with said writ of error and return.

Dated this 7th day of November, A. D. 1890.

DON M. DICKINSON,
Attorney for Pl'ff in Error.
DAN. H. BALL,
Attorney for Def't in Error.

[Endorsed:] United States of America. Supreme Court. Michael Donahoe, pl'ff in error, *vs.* Lake Superior Ship Canal, Railway and Iron Company, def't in error. Stipulation.

290 At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court-rooms, in the city of Marquette, in said district and division, on Saturday, the twenty-seventh day of September, A. D. one thousand eight hundred and ninety, and of the year of Independence the one hundred and fifteenth.

Present: Hon. Henry F. Severens, district judge.

THE LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY
vs.
MICHAEL DONAHOE.
} In Ejectment.

The jury by whom the issue joined in this cause was tried having found by their verdict that the said defendant is guilty of unlawfully withholding from the said plaintiff the said premises described in its declaration in this cause as the west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three, in township forty-three north, of range thirty-five west, in the then county of Marquette and State of Michigan and in

said district and division, and that the said plaintiff is well entitled to hold the same in fee, and having assessed the damages of the said plaintiff by reason thereof over and above its costs and charges by it about its suit in this behalf expended at the sum of six cents, therefore it is considered that the said plaintiff do recover against the said defendant the possession of the said premises, according to the verdict of the jury aforesaid, and that it have a writ of possession therefor, according to the force, form, and effect of its said recovery.

And it is further considered that the said plaintiff do re-
291 cover against the said defendant its damages by the jurors in form aforesaid assessed, together with its costs and charges aforesaid to be taxed, and that the said plaintiff have execution thereof.

292 WESTERN DISTRICT OF MICHIGAN, } ss:
Northern Division, }

I, Charles L. Fitch, clerk of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, do hereby certify the annexed and foregoing to be a true and correct copy of the record of the judgment entered in the cause therein entitled; that I have compared the same with the original record of said judgment now remaining of record in my office; that it is a true and correct copy thereof and of the whole thereof.

Seal of the U. S. Circuit Court, Western District of Mich., Northern Division.

In witness whereof I have hereunto set my hand and affixed the official seal of said court, at the city of Marquette, in said district and division, this 30th day of September, A. D. one thousand eight hundred and ninety.

CHARLES L. FITCH, *Clerk,*
By F. M. MOORE, *Deputy Clerk.*

[Endorsed:] Supreme Court of the United States. Michael Donahue, pl'ff in error, *vs.* Lake Superior Ship Canal, Railway & Iron Company, def'ts in error. Assignment of errors. Filed Sept. 30, 1890. F. M. Moore, dep. clerk. Don M. Dickinson & Benjamin Vosper, att'ys for pl'ff in error.

[Endorsed:] 1488. The circuit court of the United States for the northern div. of western dist. of Michigan. The Lake Superior Ship Canal, Railway and Iron Company *vs.* Michael Donahoe. Certified copy of record of judgment.

293 [Endorsed:] Supreme Court U. S. 1890, October term. No. 1488. Michael Donahoe, pl'ff in error, *vs.* The Lake Superior Ship Canal, Railway & Iron Co. Stipulation and addition to record. Filed Nov. 11, 1890.

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Supreme Court of the United States.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY,
Plaintiff in Error,

305. vs.

WALTER A. CUNNINGHAM.

SAME,
Plaintiff in Error,

306. vs.

HUGH FINAN.

MICHAEL DONAHUE,
Plaintiff in Error,

307. vs.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

Brief for Lake Superior Ship Canal, Railway and Iron Company.

[*In this brief the references to the record, unless otherwise stated, are to the record in case No. 305—known as the* CUNNINGHAM *case.*]

These were actions of ejectment, brought by the Lake Superior Ship Canal, Railway and Iron Company, in the Circuit Court of the United States for the Western District of Michigan, Northern Division, as follows:

Against Walter A. Cunningham, for the southwest quarter of Section 25, in Township 44 north, of Range 36 west.

Against Hugh Finan for the northeast quarter of Section 13, in the same Township.

Against Michal Donahue, for the west half of northwest quarter, and northwest quarter of southwest quarter of Section 23, in Township 43 north, of Range 35 west, in said Western District of Michigan.

The three cases were tried together, and verdict was rendered in the two cases first mentioned, by direction of the Court, in favor of the defendants, Cunningham and Finan, and in the last-mentioned case, by direction of the Court, in favor of the Lake Superior Ship Canal, Railway and Iron Company, plaintiff below, now the defendant in error in No. 307. The plaintiff below in in the first two cases, and the defendant below in the last, bring error.

By stipulation the three cases are to be heard together.

For the sake of brevity we will speak of the Lake Superior Ship Canal, Railway and Iron Company, as the Canal Company.

The Canal Grant Under Which the Plaintiff Claims Title.

On March 3, 1865, Congress made a grant of 200,000 acres of public land to the State of Michigan,

to aid in constructing the Portage Lake ship canal. The following is a copy of said act :

AN ACT, granting land to the State of Michigan to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled : That there be, and is hereby, granted to the State of Michigan the right of locating and constructing a breakwater and harbor and ship canal through any public lands at or upon the neck of land on Lake Superior known as the Portage : *Provided*, that not more that one thousand feet in width on the bank of Lake Superior shall be occupied by said breakwater and harbor, and that a strip of land not more than four hundred feet in width on said neck of land shall be occupied by said canal. *And provided, further*, that said ship canal shall be at least one hundred feet in width, with a depth of water not less than thirteen feet.

SEC. 2. *And be it further enacted*, that there be, and hereby is, granted to the said State of Michigan, for the purpose of aiding said State in constructing and completing a harbor and ship canal to connect the waters of Lake Superior with the waters of Portage Lake, two hundred thousand acres of public lands, to be selected in subdivisions agreeably to the United States survey, by an agent or agents appointed by the Governor of said State, subject to the approval of the Secretary of the Interior, from any lands in the Upper Peninsula of said State, subject to private entry. *Provided*, that said selections shall be made from alternate and odd-numbered sections of land nearest the location of said canal in said Upper Peninsula, not otherwise appropriated, and not from lands designated by the United States as "mineral" before the passage of this act, nor from lands to which the rights of preemption or homestead have attached.

then said lands shall be subject to the disposal of the Governor and Board of Control of said State, for the purpose aforesaid, and for no other; and the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or charge upon the vessels of said Government, or upon vessels employed by said Government in the transportation of any property or troops of the United States.

Sec. 4. *And be it further enacted*, that before it shall be competent for said State to dispose of any of said lands, to be selected as aforesaid, the plan of said breakwater and harbor, and the route of said canal, shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

Sec. 5. *And be it further enacted*, that if the said breakwater, harbor and ship canal shall not be completed within two years from the passage of this act, the lands hereby granted shall revert to the United States.

Sec. 6. *And be it further enacted*, that the Legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted, and of all expenditures in the construction, repairs and operating of said canal, and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said State shall be fully reimbursed for all advances made for the construction, repairs and operating of said canal, with legal interest on all advances, until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said State shall be allowed to tax for the use of said canal only such tolls as shall be sufficient to pay all necessary expenses for the care, charge and repair of the same (13 U. S. Stat. at Large, 519).

We ask attention to the following features of the act:

1. The lands were *to be selected* by agents appointed by the Governor of the State of Michigan, *subject to the approval of the Secretary of the Interior*, from any lands in the Upper Peninsula of Michigan *subject to private entry.*

2. They were to be selected from alternate and odd-numbered sections of land.

3. They were to be selected from lands nearest the location of said canal.

4. The lands were to be at the disposal of the Legislature at its then present session, "for the purpose aforesaid and no other."

On March 18, 1865, the Legislature of the State of Michigan accepted the grant of land "with the restrictions and upon the terms and conditions contained in said Act of Congress," and conferred said grant upon the Portage Lake and Lake Superior Ship Canal Company, a corporation of said State. Sections 1, 2, 3 and 4 of the Act of the Michigan Legislature being all that affect the questions in these cases, are as follows:

AN ACT to accept a grant of land by Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake, to connect with Lake Superior, and to provide for the construction of the same.

SEC. 1. *The People of the State of Michigan enact*, That the lands, franchises, rights, powers and privileges granted to and conferred upon the State of Michigan by an Act of Congress granting lands to aid in the construction of a ship canal and harbor from Portage Lake to Lake Superior, be, and the same are hereby accepted with the restrictions, and upon the terms and conditions contained in said Act of Congress.

SEC. 2. For the purpose of carrying out the object of said act, the said lands are hereby granted and conferred upon the Portage Lake and Lake Superior Ship Canal Company (a company organized under and by virtue of the laws of this State), subject to all the conditions, restrictions and obligations herein mentioned: *And provided*, That none of said lands shall be actually sold or otherwise disposed of, except for the purposes of hypothecation, until said canal and harbor shall be completed and accepted, as hereinafter specified.

SEC. 3. It shall be the duty of the Governor of this State to appoint an engineer, at such salary as he may determine, not exceeding two thousand and five hundred dollars a year, to be paid as hereinafter provided; the said engineer shall proceed to survey, lay out and es-

tablish the route of said canal and determine the *termini* thereof, and also prepare a plan for the construction of said canal and harbor in conformity with the provisions of the said Act of Congress, and make a specification and diagram thereof, to be approved by the Governor; and when approved by him the same shall be filed in the office of the Secretary of State, and a certified copy thereof, under the seal of the State, shall be filed in the office of the Register of Deeds in and for the County of Houghton, and another copy thereof certified under the said seal, shall be delivered to the said company; *Provided*, That said engineer may be removed and another one appointed, and so on, from time to time, whenever the Governor may deem it best for the interest of the State.

SEC. 4. It shall be the duty of said company forthwith, after having received said certified copy of the plan and specification of said canal and harbor, to proceed and cons ruct the same in conformity therewith; and when the said company shall have completed the said canal in pursuance of the Act of Congress, and in conformity with the said plan and specification, it shall be the duty of said engineer to certify the same to the Governor, whereupon it shall be the duty of the Governor to inspect the said work in person, or to appoint one or more agents to inspect the same and determine whether the said canal and harbor are constructed as required by this act; and whenever the Governor shall determine that the said canal and harbor has been constructed by the said company as required by said Act of Congress, and in conformity with the said plan and specification, he shall certify the same to said company and deposit a copy thereof in the office of the Secretary of State, and another copy thereof in the said office of the Register of Deeds in and for said county of Houghton, and which certificate, as well as any certified copy thereof under the seal of the State or made by said Register, shall be evidence of the facts therein set forth; and when the Governor shall make such certifi-

~~SEC. 5. And be it further enacted, that the said lands hereby granted shall be subject to the disposal of the Legislature of said State, or if the Legislature thereof shall not be in session, or shall adjourn within ten days after the passage and approval of this act,~~

cate and deliver the same to said company, the said company shall stand seized and possessed of the said

lands as fully as the State can convey the same, and free of any tax for the term of four years, if so long held by said company; and the said company may, after having received such certificate, sell and dispose of said lands as the absolute owner thereof (Session Laws of Michigan for 1865, p. 474).

It will be noted:

1. That the entire title to said lands, so far as the State could grant the same, was, by said act, vested in the Portage Lake and Lake Superior Ship Canal Company.

2. That said company was authorized at once before the completion of the canal and harbor to hypothecate said lands.

3. That the Governor of said State was fully empowered to determine when the canal and harbor had been constructed in accordance with the Act of Congress, and with the plans and specifications.

4. That when the Governor should determine that the work was completed, he should certify to that fact under his hand and the seal of the State, and deliver such certificate to the company, which should vest in the company the full, complete and absolute title to the land, with full right of disposition of the same.

July 3, 1866, Congress granted to the State of Michigan 200,000 acres of land, in addition to the first grant, to aid in the building of said harbor and ship canal. The following is the text of said act:

AN ACT granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that there be, and hereby is, granted to the State of Michigan to aid in the building of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in addition to a former grant for that purpose, approved March the 3d, 1865, two hundred thousand acres of land in the Upper Peninsula of the State of Michigan, and from land to which the right of homestead or pre-emption has not attached: *Provided*, That one hundred and fifty thousand acres of said lands shall be selected from alternate odd-numbered sections, and fifty thousand acres from even numbered sections of the lands of the United States. Said grant of lands shall inure to the use and benefit of the Portage Lake and Lake Superior Ship Canal Company, in accordance with an Act of the Legislature of the State of Michigan conferring the land granted to the said State, by the act herein referred to, on said company: *And provided further*, That the time allowed for the completion of said work, and the right of reversion to the United States, under the said Act of Congress, approved March the 3d, 1865, be extended three additional years: *And provided further*, That no lands designated by the United States as "mineral," before the passage of this act, shall be included within this grant (14 U. S. Stat. at Large, p. 81).

It will be observed on comparing this act with the above-quoted Act of March 3, 1865:

1. That the word "public" is omitted in the latter act, as descriptive of the lands granted. It also omits the requirement that the lands granted by said act shall be "lands subject to private entry."

2. It does not require lands to be selected "nearest the location of said canal."

3. Fifty thousand acres are to be selected from even-numbered sections.

4. This latter act provides that " said grant of lands shall inure to the use and benefit of the Portage Lake and Lake Superior Ship Canal Company, in accordance with an Act of the Legislature of the State of Michigan, conferring the land granted to the said State by the act herein referred to on said company."

March 27, 1867 (Session Laws of Michigan for 1867, Vol. 2, p. 960), the Legislature of Michigan, by act approved on that date, accepted this second grant " in accordance with all the conditions and provisions in said act contained." The following is the text of said act of the Michigan Legislature:

SECTION 1. That the grant of land accruing to the State of Michigan under and by virtue of an Act of Congress approved July 3, 1866, to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, be, and the same is hereby, accepted in accordance with all the conditions and provisions in said act contained; provided, none of said lands shall be located in the County of Ontonagon until the completion of the said harbor and ship canal.

SEC. 2. This act shall take immediate effect.

In this connection we ask attention to the provision in said Act of Congress, referred to in the Act of the Legislature, that the grant should inure to the benefit of the Portage Lake and Lake Superior Ship Canal Company.

The lands involved in these suits were selected and certified under this Act of Congress of July 3, 1866 (Rec., pp. 43 and 44).

The Portage Lake and Lake Superior Ship Canal Company entered upon the work of constructing the canal and harbor, and in pursuance of the power given by the Act of the Legislature, and adopted by Con-

gress in the second granting act, on **the first of July, 1865,** executed a mortgage to Columbus C. Douglas, trustee, on all the lands embraced in the first grant to secure the payment of bonds to the amount of $500,000.

On the 1st day of July, 1868, said company executed a mortgage on the 200,000 acres of land embraced in the second grant to Randolph Martin and Thomas T. Davies, trustees, to secure the payment of additional bonds to the amount of $500,000. All these bonds were issued by the said company, and by it negotiated and used, and at the time of the decree hereinafter mentioned, were held by *bona fide* holders, for value (Record, p. 68).

On the 1st day of July, 1870, said company executed a third mortgage of all its property, including the lands embraced in both grants, to Charles L. Frost, trustee, to secure the payment of 1,250 bonds of $1,000 each, all of which were issued, negotiated and used, and $1,000,000 of which, at the time of said decree, were outstanding, overdue and unpaid in the hands of *bona fide* holders for value (Record, p. 69).

In a suit brought by the trustee named in the first mortgage above mentioned to foreclose the same, the canal not being then finished, a Receiver was appointed and authorized by the Court to issue certificates of indetbedness bearing interest at ten per cent. for the purpose of raising money to finish the work, which certificates, by order of the Court, were made a first lien on all the property of the company. The certificates so issued consisted of two series, the first being 500 in number, for $1,000 each, bearing date the 1st day of July, 1872, and the second consisting of 126

in number, for $1,000 each, bearing date the 1st day of May, 1875, all of which, at the date of said decree, remained outstanding and unpaid, and were declared by said decree to be a paramount lien upon both said land grants and all other property of the company (Rec., pp. 70, 71).

On the 1st day of May, 1871, said company also issued another mortgage to the Union Trust Company of New York to secure the payment of 1,300 bonds, of $1,000 each, covering all the property of said company, and also certain other lands described therein, which said bonds, at the date of said decree, were outstanding in the hands of *bona fide* holders for value (Rec., pp. 69, 70).

The entire amount of bonds and certificates so issued and outstanding, constituting liens on the property of said company, amounted in all to $2,626,000, besides the $1,300,000 of bonds secured by the Union Trust Company mortgage, covering the lands embraced in these two grants, and other lands.

April 29, 1871, said Portage Lake and Lake Superior Ship Canal Company, by an amendment of its articles, changed its name to the Lake Superior Ship Canal, Railroad and Iron Company (Rec., p. 45).

On the 19th of May, 1871, the lands in dispute were certified by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, dated May 22, 1871, endorsed thereon, to the State of Michigan **under the "Canal Act" of July 3, 1866,** as "being vacant and unappropriated lands designated by odd numbers nearest the location of said canal," and "granted to the State of Michigan by the Act of Congress approved the

third day of July, 1866." This list embraced all of Section 25, Township 44, Range 36. The suit against Cunningham involves the southwest quarter of said section (Record, p. 44). This list also embraces the land in dispute in the Finan case. The list also embraces the land in dispute in the Donahue case (Record, Donahue case, p. 6). The Interior Department refused to certify these lands until the Governor's release to the United States, of August 14, 1870, was executed (Letter of Commissioner of General Land Office, October 6, 1869, Record, p. 121).

July 3, 1872 (Rec. p. 53)

Suits for the foreclosure of these mortgages and liens were brought in the Circuit Court of the United States for the Eastern District of Michigan, against the company, by its name as set forth in its amended articles, and decrees were entered therein on the **15th day of June, 1874, and on the 12th day of February, 1877,** finding the existence of the facts above mentioned, in relation to said mortgages and certificates, and decreeing the sale of all said property embraced in both said land grants, to satisfy said mortgages and liens (Rec., pp. 53 to 78).

The said decrees further find that full lists and descriptions of said 400,000 acres of land were approved by the Secretary of the Interior and certified to the State of Michigan according to law. The first of these decrees was affirmed by the Supreme Court of the United States in the case of Jerome vs. Carter, 94 U. S., 734.

On May 15, 1877, articles of association of the **Lake Superior Ship Canal, Railway and Iron Company,** organized under the laws of Michigan of 1875 (p. 287), and the laws of 1872 (p. 83), were duly filed in the office of the Secretary of State of

Michigan, with authority, among other things, to own and operate a ship canal, and to acquire, own and hold property (Rec., pp. 45 to 48).

Amended articles of the same corporation, subsequently adopted, appear on pages 49 to 52 of the record.

This new company, viz., the "Lake Superior Ship Canal, Railway and Iron Co." was the plaintiff below in each of these suits (Nos. 305, 306, 307). It is a new company and must not be confused (as it seems to have been in the minds of some of the judges who have dealt with it) with the old canal company to which the grant was originally made.

On May 14, 1877, all the lands embraced in said two land grants were duly sold, under the aforesaid decrees, by a Master in Chancery of said Circuit Court of the United States for the Eastern District of Michigan to Albon P. Man and Nathaniel Wilson, representing the holders of said bonds and certificates, and on the **15th day of the same month** said lands were duly conveyed by said Albon P. Man and Nathaniel Wilson to said Lake Superior Ship Canal, Railway and Iron Company (Rec., pp. 78–79).

Since the time of such conveyance said Lake Superior Ship Canal, Railway and Iron Company has continuously exercised acts of ownership over all said lands, has paid large amounts of taxes assessed thereon from year to year, under the authority of the State of Michigan, and has remained in the undisputed possession thereof, except so far as the same have been trespassed upon by the defendants in said actions of ejectment, and others unlawfully entering thereon (Rec., pp. 102, 103, 178, 179).

By means of the moneys raised by said mortgages

and said certificates of indebtedness, the work of construction of the canal and harbor was carried forward.

Congress, by various acts, extended the time for its completion to the **first day of December, 1873** (see Act of April 10, 1869, 16 Stat. at Large, 55; Act of March 2, 1871, 16 Stat. at Large, 599; Act March 27, 1872, 17 Stat. at Large, 44; Act March 3, 1873, 17 Stat. at Large, 627).

This was done with full knowledge, actual or constructive, of what was being done in the Federal Court, and of the borrowing of money, on the faith of the land grants, to complete the canal.

The canal was completed in **October, 1873.** This appears from the certificate of the State Engineer, dated **October 18, 1873,** and the certificate of the Governor, dated **November 29, 1873** (Rec., pp. 98 to 101).

These certificates of the Governor set forth the fact of the final completion of the work, in accordance with the plans and specifications; but for the reasons therein stated, the Governor withheld the **final certificate until June 25, 1875,** appearing on page 98 of the record, on which date he gave the final certificate, designed under the Act of the Michigan Legislature to finally and fully vest the absolute title and right of disposition of all the lands in the company known at that time as the Lake Superior Ship Canal, Railroad and Iron Company.

By the series of acts and events above enumerated the title to the lands covered by said two grants, including the lands involved in these suits, became fully vested in said Lake Superior Ship Canal, Railway and Iron Company.

Defense.

The defendants in the ejectment suit seek to defeat the title of the Lake Superior Ship Canal, Railway and Iron Company by showing irregularity, illegal action or excess of authority on the part of the officers of the United States in the selection and certification of the lands, and by attempting to show that the title to said lands was not in the United States at the time of the selection and certification thereof under said granting acts.

The contention of the defendants is that the lands were embraced in the grant to the State for railroad purposes under the Act of June 3d, 1856, referred to below, and that the title still remained in the State at the time of the selection, as canal lands, and at the time of the commencement of the suit. The grant of June 3d, 1856, is said to be one *in presenti* and upon a condition subsequent, and that a failure to perform the condition by the grantee does not of itself work a forfeiture and reversion.

The railroad grant set up by defendants to defeat the plaintiff's title.

The facts appearing from the record, in relation to this railroad grant, are briefly as follows:

In the winter of 1856 a railroad scheme was planned to connect northern Wisconsin and the upper peninsula of Michigan with the settled portions and business centres of the country via Chicago. All that region at that time was a wilderness, having no communication with the outer world except during the period of navi-

gation by lakes, and in the winter by long and tedious journeys for hundreds of miles through the woods by snow shoes and dog trains. The object was to provide for a system of railroads whereby that distant country, then known to be exceedingly valuable for its mines of iron and copper and its forests of timber, might be reached at all seasons of the year, so as to develop its immense resources.

A railroad in Wisconsin was at that time completed, or nearly so, from Chicago northerly to Fond du Lac, at the south end of Lake Winnebago. The scheme contemplated the construction of a railroad northerly from Fond du Lac to the line between Wisconsin and the northern peninsula of Michigan, and thence in two branches to Marquette and Ontonagon on the Lake Superior shore. A railroad was also contemplated to connect Ontonagon and Marquette, and the latter place with the waters of Lake Michigan, via Little Bay de Noquet, at the north end of Green Bay.

For the purpose of aiding in the prosecution of this railroad scheme, Congress, during the session of 1856, made grants of land as follows:

On the **third day of June, 1856,** to the State of Wisconsin, for a railroad "from Fond du Lac, on Lake Winnebago, northerly to the State line" (11 Stat. at Large, p. 20). The material part of this Act is reprinted on the margin.*

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* **AN ACT granting public lands to the STATE OF WISCONSIN to aid in the construction of railroads in said State** (11 Stats. at Large, p. 20).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That there be and is hereby granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison, or Columbus,

On the **third day of June, 1856,** to the State of Michigan, for "Railroads from Little Bay de Noquet to Marquette, thence to Ontonagon, and from the last two named places to the Wisconsin State line" (11 Stat. at Large, p. 21). This Act is reprinted in full on the margin.†

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by the way of Portage City to the St. Croix River or Lake between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior; and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the State line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid or that the right of pre-emption has attached to the same, &c.

[Here follow the usual indemnity provisions, &c.]

† **CHAP. XLIV.—An act making a grant of alternate sections of the public lands to the STATE OF MICHIGAN, to aid in the construction of certain railroads in said State, and for other purposes** (11 Stats. at Large, p. 21).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That there be and hereby is granted to the State of Michigan, to aid in the construction of railroads from Little Bay de Noquet to Marquette, and thence to Ontonogon, and from the two last named places to the Wisconsin State line; and also from Amboy, by Hillsdale and Lansing, and from Grand Rapids to some point on or near Traverse Bay; also from Grand Haven and Pere Marquette to Flint, and thence to Port Huron, every alternate section of land designated by odd numbers; for six sections in width on each side of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to sepect, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption has attached, as aforesaid; which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid,

The grants were of the alternate sections of land designated by odd numbers, for six sections in width on each side of said roads.

Section 2 of the said Michigan act provided that the lands within six miles on each side of the road, which remained in the United States, should not be sold for less than the double minimum price, nor should they become subject to private entry until offered for sale at the increased price.

/4 **By Section 3** it was provided that, "if any of said roads is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States."

The grant to the State of Michigan was accepted by

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together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Michigan for the use and purpose aforesaid: Provided, That the lands to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for, and on account of each of said roads: Provided further, That the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: And provided further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted subject to the approval of the President of the United States.

SEC. 2. And be it further enacted, That the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of each of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 3. And be it further enacted, That the said lands hereby granted to the said State, shall be subject to the disposal of the Legislature thereof for the purposes aforesaid and no other; and

the Michigan Legislature by act approved **February 14, 1857** (Laws of 1857, p. 346).

By Section 1 it was provided "that the lands, franchises, rights, powers and privileges granted to and conferred upon the State of Michigan by an Act of Congress entitled 'An Act making a grant of alternate sections of land to the State of Michigan, to aid in the construction of certain railroads in said State, and for other purposes,' approved June 3, 1856, be, and the same are hereby, accepted, with the restrictions and upon the terms and conditions contained in said Act of Congress."

Section 2 provides as follows: "So much of the aforesaid lands, franchises, rights, powers and privileges as are, or may be, granted and confirmed in pursuance of said Act of Congress, * * * to aid in the construction of the railroad from Marquette to the Wisconsin State Line, be, and the same are hereby, vested fully and completely in the **Marquette and**

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the said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

SEC. 4. And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads may be sold; and so from time to time until said roads are completed; and if any of said roads is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

SEC. 5. And be it further enacted, That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct: Provided, That until such price is fixed by law, the Postmaster-General shall have the power to determine the same.

Approved June 3, 1856 (11 Stats. at Large, p. 21).

State Line Railroad Company; in like manner, all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said Act of Congress, to aid in the construction of a railroad from Ontonagon to the Wisconsin State Line, are hereby vested fully and completely in the **Ontonagon and State Line Railroad Company**; in like manner all the lands, franchises, rights, powers and privileges which are or may be granted and conferred, in pursuance of said Act of Congress, to aid in the construction of a railroad from Little Bay de Noquet to Marquette, are hereby vested fully and completely in the Bay de Noquet and Marquette Railroad Company; in like manner, all the lands, franchises, rights, powers and privileges which are, or may be, granted and conferred, in pursuance of said Act of Congress, to aid in the construction of a railroad from Marquette to Ontonagon, are hereby vested fully and completely in *the Marquette and Ontonagon Railway Company*. All and each of the several railroad companies mentioned in this section shall be subject to all the conditions, restrictions and obligations imposed on them by this act, as hereinafter provided."

Said act provided for a Board of Control, for the purpose of managing and disposing of the lands embraced in said grant, and Section 11 provided that in case either of the railroad companies should fail to construct its entire line of road, or any part thereof, in the time and manner required by said act, the Board of Control should have power, and it was made their duty, to declare the lands, so far as not sold in good faith, forfeited to the State, and to confer the lands upon some other competent party.

Section 19 provided that the said railroads in the upper peninsula of Michigan should complete the first twenty miles of their several roads within three years from the first day of December, 1857, and complete the entire length of its road within seven years from the 15th day of November, 1857.

The text of said Section 19 on this point is as follows:

"SEC. 19. Each and every one of the aforesaid railroad companies shall complete and put in good running order at least twenty continuous miles of its road during each year from and after the first day of December, 1858, and shall complete the entire length of its road within seven years from the fifteenth day of November next, except the railroads in the upper peninsula herein named; and as to these each and every one of them shall complete the first twenty miles of their several roads within three years from the first day of December next, and the entire lines of their several roads within the time above limited." (Laws of Michigan, 1857, p. 346 *et seq.*)

When the grant to the State of Michigan was on its passage in Congress, it was explained by the promoters of the bill that the grant of lands for the construction of roads from Marquette and Ontonagon to the State line was designed to aid in the construction of a line of railroad from the iron and copper districts of Michigan to Northern Wisconsin, to connect with the line of road then in process of construction from Chicago to the State line via Milwaukee and Fond du Lac.

Cong. Globe, 1855, 1856, Part 2, page 1313.

The said Marquette and State Line Railroad Company and the said Ontonagon and State Line Railroad Company were mere skeleton companies, organized for the purpose of receiving said grant, and neither of them ever surveyed any line of road or filed any map (Rec., p. 104).

Shortly after their incorporation, and prior to **April 6, 1857,** they were both consolidated with the Chicago, St. Paul and Fond du Lac Railroad Company, an Illinois and Wisconsin corporation, upon which the Wisconsin Legislature had conferred the Wisconsin

grant above referred to, and the consolidated company took the name of the **Chicago, St. Paul and Fond du Lac Railroad Company.** By such consolidation all the rights, franchises, lands and land grants, and property of every description, belonging to either of said original corporations, became and were vested in said consolidated corporation, pursuant to the laws of Michigan, Wisconsin and Illinois (Rec., p. 149).

Said consolidated company--The Chicago, St. Paul and Fond du Lac Railroad Company—**November 27, 1857,** filed in the General Land Office maps and surveys of both these lines of road, showing a continuous line of railroad from Fond du Lac northerly to the State line, and thence northerly in Michigan nearly seven miles by a single line, then dividing into two branches, one going to Marquette and one to Ontonagon. The whole line, including the road in Wisconsin, and both branches in Michigan, is called and known as "The Chicago, St. Paul and Fond du Lac Railroad" (Rec., pp. 104 and 105, and p. 167).

The *Michigan* part of the road, including the two branches, was shown, a single map of definite location. [See map in record between pp. 42 and 43.] We quote the *certificate of the railroad company* appearing on the margin of the map:

"OFFICE OF THE CHICAGO, ST. PAUL AND FOND DU LAC RAILROAD COMPANY,
CHICAGO, October twenty-second, 1857.

"It is hereby certified (in pursuance of the Act of the legislature of the State of Michigan, approved Feb. 14, 1857, entitled 'A Bill Disposing of Certain Grants of Land Made to the State of Michigan for Railroad Purposes,' by Act of Congress, approved June 3d, 1856, and also in pursuance of an Act of the legislature of said State approved February 19th, 1855),

this map shows the location of the *line* or *route* of the Chicago, St. Paul and Fond-du-Lac Railroad from Ontonagon and Marquette to the Wisconsin State line as definitely fixed, in compliance with said Act of Congress, and in pursuance of an order of the Board of Directors of said company directing C. L. Johnson, Chief Engineer of said Company, to locate and definitely fix said route, and which line or route has been approved and adopted by said Board of Directors, and the dates of the field work are truly indicated along the line upon the map.

In testimony whereof, &c.

(Signed by the president and chief engineer and authenticated by the corporate seal.)

We also quote the *certificate of the Governor of Michigan* upon the same map:

"STATE OF MICHIGAN, ss.,
Executive Department,
LANSING, November 12th, 1857.

"I, Kinsley S. Bingham, Governor of the State of Michigan, do hereby certify that in pursuance of an Act of Congress, approved June 3d, 1856, entitled 'A bill, making a grant of land to the State of Michigan in alternate sections to aid in the construction of railroads in said State,' and an Act of the Legislature of said State, approved February 14th, 1857, entitled 'A bill disposing of certain grants of land made to the State of Michigan by Act of Congress, approved June 3d, 1856,' and certain 'articles of consolidation' bearing date on the 21st day of March, 1857, made and entered into by and between the Chicago, St. Paul and Fond du Lac Railroad Company and the Marquette and State Line Railroad Company, and certain "articles of consolidation" bearing date on the 27th day of March, 1857, made and entered into by and between the said "Chicago, St. Paul and Fond du Lac Railroad Company" and the "Ontonagon and State Line Railroad Company," said Chicago, St. Paul and Fond du Lac Railroad Company has located the *line* and *route* of its *railroad* from Marquette and Ontonagan on Lake Superior to the Wisconsin State line,

and that this map is an exact duplicate of the map or plat filed by said company in this office showing the location of the *line* for said *railroad* by said Chicago, St. Paul and Fond du Lac Railroad Company."

In testimony whereof I have hereunto set my hand and caused to be affixed the great seal of the State of Michigan.

Done at Lansing this 12th day of November, Anno Domini 1857, and the independence of the United States the eightieth.

By the Governor,
KINSLEY S. BINGHAM.

[SEAL.] E. A. THAYER,
Dep. Secretary of State."

Similar certificates on the *Wisconsin* map were made by the said Chicago, St. Paul and Fond du Lac Railroad Company, verified October 22, 1857, and by the Governor of Wisconsin under date of November 6, 1857, as appears by map B in the record, inserted between pages 42 and 43, said two maps A and B thus showing, as above stated, a continuous line of definite location of railroad by the Chicago, St. Paul and Fond du Lac Railroad Company extending through Wisconsin from Fond du Lac to the State line of Michigan, and from the State line of Michigan, through Michigan, partly by a continuous line and then by one branch leading to Marquette and another to Ontonagon.

Copies of said maps appear as **Exhibits A and B**, to the bill of exceptions. These surveys were afterwards accepted by the Land Department.

The Chicago, St. Paul and Fond du Lac Railroad Company never constructed any portion of its line (Record, p. 147).

On the 6th day of April, 1857, said consolidated corporation executed a mortgage to William A. Booth, James A. Lanier and William B. Ogden, as trustees, to secure the payment of certain bonds issued by said

corporation, which mortgage covered all the property of the company, including the land grants in Wisconsin and Michigan (Record, p. 149 and 150).

This mortgage was foreclosed by advertisement under the power of sale contained in the mortgage, and on such mortgage sale all the property of said Chicago, St. Paul and Fond du Lac Railroad Company was conveyed by deed to Samuel J. Tilden and Ossian D. Ashley **June 2, 1859,** and on the **first day of July, 1859,** said Tilden and Ashley conveyed the same to the **Chicago and Northwestern Railway Company,** a corporation formed and organized in pursuance of acts of the Legislatures of the States of Wisconsin and Illinois for the purpose of forming said companies and authorizing them to purchase all the property, rights and franchises of the Chicago, St. Paul and Fond du Lac Railroad Company (Record, p. 150 and 151).

On the 30th day of June, 1859, said Chicago, St. Paul and Fond du Lac Railroad Company, by deed of that date, reciting the execution of the mortgage and the foreclosure sale above mentioned, and the sale under said foreclosure to said Tilden and Ashley, also reciting the organization of the Chicago and Northwestern Railway Company, and the fact that said grantees were about to convey said railway property, franchises and rights and lands to the Chicago and Northwestern Railway Company, in consideration thereof, and of one dollar, granted and conveyed to said Tilden and Ashley all the rights, property and franchises mentioned and set forth in said mortgage, including the land grants in Wisconsin and Michigan above mentioned (Record, p. 151).

Certifications of Lands to Michigan under the Railroad Grant.

In 1861 there were certified to the State of Michigan by the Interior Department four lists of lands falling within the six-mile limits of said Chicago, St. Paul and Fond du Lac Railroad in Michigan and its two branches, to wit:

1. Lands within the six-mile limits of the Marquette and State Line branch (clear), 112,145.38 acres (Rec., p. 106).

2. Lands within the six-mile limits of the Ontonagon and State Line branch (clear), 142,430.23 acres (Rec., pp. 106, 107). This list embraced the lands involved in the suit against Walter A. Cunningham and against Hugh Finan.

3. Lands in the *common limits* of the Ontonagon and State Line and Marquette and State Line branches, 41,649.25 acres (Rec., pp. 108, 109). This list embraced the land involved in the Michael Donahoe case (see Donahoe Record, pp. 10, 11).

4. Lands in the *common limits* of the Ontonagon and State Line and Marquette and Ontonagon Railroads, 32,305.95 acres (Rec., p. 151).

By reference to the map, **Exhibit A** (Record, between pp. 42 and 43), it will be seen that the northern boundary of the six-mile limits of the Marquette and State Line road would cross the Ontonagon branch something like thirteen or fourteen miles north of the Wisconsin State line, and that the entire six-mile limits of the Ontonagon branch from that point to the State line would also be embraced in the six-mile limits of the Marquette line.

The Menominee Scheme of the Chicago and Northwestern Railway Company.

March 4, 1861, an act was passed by the Michigan Legislature reciting that:

"Whereas, the Marquette and State Line Railroad Company have heretofore consolidated with the Chicago, St. Paul and Fond du Lac Railroad Company, in Wisconsin, and said company have become insolvent, and all its property in Wisconsin transferred to another company. **And, whereas, the most practicable route for a railroad connecting Lake Superior with the system of railroads in Wisconsin should be located on a route different from the one heretofore partially selected, namely, from Marquette to the mouth of the Menominee river,"** whereby it was enacted that, for the purpose of placing the lands, rights and privileges granted by the Act of Congress of June 3, 1856, "to aid in the construction of a railroad from Marquette to the Wisconsin State line, near the mouth of the Menominee river, in a position to encourage the early construction of said road, do hereby repeal so much of Section 2 of 'An Act to repeal Section 20 of an Act disposing of certain lands for railroad purposes, approved February 14, 1857,' approved February 15, 1859, as relates to the extension of the time to complete the first section of twenty miles of the Marquette and State Line road, or any other Act amendatory thereto, and do hereby place the same in charge of the Board of Control, which shall have power, and it is hereby made their duty, to confer said lands, franchises, rights, powers and privileges upon some other competent party or company, under the general regulations and restrictions of an Act disposing of certain grants of lands made to the State of Michigan for railroad purposes, by an Act of Congress approved June 3, 1856, and approved February 14, 1857, and all Acts amendatory thereto."

Session Laws of 1861, page 123.

The Chicago and Northwestern Railway Company, for the purpose of utilizing the grant in Michigan, promoted the formation of the **Peninsula Railroad Com-**

pany, and on its request, **April 16, 1862,** the Michigan Board of Control conferred the Marquette and State Line grant upon the Peninsula Railroad Company, and authorized the use of the grant for the construction of the line of road from Marquette to the State line at or near the mouth of the Menominee River, and adopted a resolution requesting Congress to authorize the relocation of the line accordingly (Rec., pp. 133 to 138).

April 25, 1862. Congress passed the following joint resolution:

A resolution explanatory of and in addition to the Act of June third, eighteen hundred and fifty-six, granting public lands to the STATE OF WISCONSIN to aid in the construction of railroads in said State.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled: That the word "northerly," in the first section of the act entitled "An Act granting public lands of the State of Wisconsin to aid in the construction of railroads in said State," approved June third, eighteen hundred and fifty-six, shall, without forfeiture to said State or its assigns of any rights or benefits under said act, or exemption from any of the conditions or obligations imposed thereby, be construed to authorize the location of the line of railroad in said first section provided for, upon any eligible route within ranges sixteen to twenty-three, inclusive, east of the fourth principal meridian. And the line of railroad as now located according to the records of the General Land Office in pursuance of said act is hereby authorized to be changed to within the above specified limits: *Provided, however,* that upon the construction of said railroad upon the new line, or of a sufficient part thereof, according to the terms of said act, the State of Wisconsin, its grantees or assigns, shall receive upon the route originally located, and in the manner prescribed by the act, the same quantity of lands, and no more or other, except as hereinafter provided for, as it or they would have received if such railroad had been constructed upon the line originally located.

SEC. 2. *And be it further resolved*, that there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from the Town of Appleton, in said State, to some point on Green Bay, at or near the mouth of Fox River, in said State, so much of the public lands of the United States lying at or near the mouth of said river, in the County of Brown and State of Wisconsin, known as the Fort Howard Military Reserve, as may be required for right of way, tracks, turnouts, depots, workshops, warehouses, wharves, and other railroad uses, not exceeding eighty acres, to be so selected by the State of Wisconsin or her assigns as to exclude the fort therefrom: *Provided, however*, that, if no railroad be constructed and in running order between the termini in this section mentioned within three years from the passage of this joint resolution, then this grant shall be void.

SEC. 3. *And be it further resolved*, that the Secretary of the Interior be, and he is hereby, authorized to cause all even sections or parts of even sections of public land that may be brought within six miles of the new line of railroad, as herein provided for, to be sold at the same price and in the same manner as those have been upon the originally located route of railroad. And all purchasers, or their heirs or assigns, within the six-mile limits of the said originally located route, who shall be more than six miles from the new line of route herein authorized, and who have paid the sum of two dollars and fifty cents an acre, shall have the right either to exchange their locations upon the line as first established to the new line, upon the same terms, in like quantities, and in the same manner, as on the line first established as aforesaid, or, at their option, to enter without further payment, anywhere within the Menasha land district, in the State of Wisconsin, an additional quantity of public lands, subject to private entry at one dollar and twenty-five cents an acre, equal to the quantity entered by them at two dollars and fifty cents an acre, so that the lands originally entered by them shall thus be reduced to the rate of one dollar and twenty-five cents an acre.

SEC. 4. *And be it further resolved*, that the even sections of public lands reserved to the United States by the aforesaid Act of June third, eighteen hundred and fifty-six, along the originally located route of railroad north of the said Town of Appleton, and along which no railroad has been constructed, shall hereafter be

sold at one dollar and twenty-five cents an acre (12 Stats. at Large, p. 618).

Approved, April 25, 1862.

July 5, 1862, Congress, by joint resolution, authorized the relocation of the line of railroad in Michigan from Marquette to the State line, as requested by said Board of Control (12 Stat. at Large, 620).

Said joint resolution was as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "Wisconsin State Line," in the first section of an act entitled "An Act making a grant of lands to the STATE OF MICHIGAN, in alternate sections, to aid in the construction of railroads in said State," approved June third, eighteen hundred and fifty-six, shall, without forfeiture to said State or its assigns of any rights or benefits under said act, or exemption from any of the conditions or obligations imposed thereby, be construed to authorize the location of the line of railroad provided for in said act, from Marquette, on on Lake Superior, to the Wisconsin State line, upon any eligible route from the township of Marquette aforesaid, to a point on the Wisconsin State line, near the mouth of the Menominee River, and touching at favorable points on Green Bay, with a view of securing a railroad, available for military purposes, from Green Bay to the waters of Lake Superior. And the line of railroad as now located, in pursuance of said Act, from Marquette to the Wisconsin State line, according to the records of the General Land Office, is hereby authorized to be changed so as to conform to the route above indicated, which line, when surveyed, and the maps and plats thereof filed in the proper office, as required under said Act of June third, eighteen hundred and fifty-six, shall confer the same rights upon and benefits to the State of Michigan and its assigns in said new line as though the same had been originally located under said act.

SEC. 2. *And be it further resolved,* That that the provisions of an Act of Congress, approved August fourth, eighteen hundred and fifty-two, entitled "An Act to grant the right of way to all rail and plank roads and macadamized turnpikes passing through the public

lands belonging to the United States," be, and the same are hereby extended so as to be applicable to the new line of railroad so as above to be located. *Provided*, the same shall be commenced within two years from the fourth day of August, eighteen hundred and sixty-two, and shall be completed within five years thereafter.

SEC. 3. *And be it further resolved*, that the Secretary of the Interior be, and he is hereby, authorized to cause all even sections or parts of even sections of public lands that may be brought within six miles of the new line of railroad, as herein provided for, to be sold at the same price and in the same manner those have or might have been, according to the said Act of June third, eighteen hundred and fifty-six, upon the originally located route of railroad. And all purchasers, or their heirs or assigns, within the six miles limits of said originally located route, who shall be more than six miles from the new line of route hereby authorized, and who have paid the sum of two dollars and fifty cents an acre, shall have the right either to exchange their locations upon the line, as first established, to the new line upon the same terms, in like quantities, and in the same manner, as on the line first established, as aforesaid, or at their option, to enter, without further payment, anywhere within the Marquette Land District in the State of Michigan, or that of the Grand Traverse Land District in said State, lying north or west of Lake Michigan, an additional quantity of public lands, subject to private entry, at one dollar and twenty-five cents an acre, equal to the quantity entered by them at two dollars and fifty cents per acre, so that the lands originally entered by them shall be thus reduced to the rate of one dollar and twenty-five cents an acre.

SEC. 4. *And be it further resolved*, that the even sections of public lands reserved to the United States by the aforesaid Act of June third, eighteen hundred and fifty-six, along the originally located route of the Marquette and Wisconsin State Line Railroad Company, except where such sections shall fall within six miles of the new line of road so as aforesaid proposed to be located, and along which no railroad has been constructed, shall hereafter be subject to sale at one dollar and twenty-five cents per acre.

SEC. 5. *And be it further resolved*, that upon the filing in the General Land Office of the lists of said

railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the land as aforesaid, set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise encumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, selected in like manner, upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile, in the aggregate, for every mile of the new line, according to the general provisions of the Act of June third, eighteen hundred and fifty-six. And it shall be the duty of the Commissioner of the General Land Office to re-offer for public sale, in the usual manner, the lands embraced in the lists of surrendered lands aforesaid, when duly filed in this office as herein directed.*

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* The purpose of Congress in passing the original Act of June 3, 1856, making a grant of lands to Michigan is well stated by Mr. WALBRIDGE, who had the bill in charge in the House, in his remarks to the House explaining its nature and purpose; and its purpose in passing the Joint Resolution of July 5, 1862, by Senator HARLAN, who had charge of it in the Senate. That purpose was *one continuous line of road* to connect Lake Superior with the railroad system of Wisconsin and the East and South.

May 27, 1856, Mr. WALBRIDGE said:

"MR. SPEAKER—I have but a few words to say to the House. The bill which has just been reported from the Committee on Public Lands is, in its main features, an exact copy of other bills considered and passed at this Session granting lands in alternate sections to aid in the construction of railroads. The only difference is that of description and location of roads.

"The bill provides for the construction of a line of road from the south shore of Lake Superior—the iron and copper mining region—to the northern line of Wisconsin. It will then connect with a road now in process of construction northward from Chicago to Milwaukee by way of Fond du Lac. The House made a grant of land the other day to aid in the construction of that Wisconsin road.

"This bill also provides for a route to the iron and copper mining region across Lake Michigan—the termini on either side of the lake being connected by steamboat navigation, and leading from Detroit. Thus will that rich mining country be opened to the

We ask particular attention to the following provisions of the act:

1. Section 1 authorized the change of the route, so as to reach the State line at or near the mouth of the Menominee River, and transferred the grant to lands lying within six miles of the relocated line.

2. Even sections within the new six-miles limits were to be sold at the double minimum price (Sec. 3).

3. The purchasers of lands along the original line at two dollars and fifty cents per acre, whose lands should lie more than six miles from the new line, should have the right to change their locations to lands within six miles of the new line, or, in lieu thereof, to take a like quantity of minimum price lands without further payment (Sec. 3).

This privilege was not confined to purchasers of

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trade of the East, West and South, as well in winter as in summer, and thus will be continued northward the great national line of railroad from the Gulf of Mexico. The south shore of Lake Superior will be joined with the waters that wash our extreme southern limits. All this national line of road has been provided for in one way or another excepting the link for which this bill now makes provision. Some of the road has been built, and other portions are in the progress of construction" (Congressional Globe, 1855, 1856, Part II., p. 1313).

On the JOINT RESOLUTION of July 5, 1862, Senator HARLAN, July 2, 1862, having the matter in charge, said:

"I will state, in explanation, that this Joint Resolution proposes to permit the State of Michigan to relocate a railroad. It makes no new grant of land, and is a matter of interest to the State of Michigan alone. Congress has during the present session permitted the State of Wisconsin to relocate a part of the same road to extend up to a line between the two States, and this is necessary in order to keep the line of the road, as I understand, according to the original design and make the work practical" (Cong. Globe, 2d Session, 37th Cong., 1861 and 1862, Part 4, p. 3049).

lands along the Marquette line which were not within six miles of the Ontonagon line, but was equally available for purchasers of lands in even sections lying more than six miles from the new line, and within the six-miles limits of the old Ontonagon line; **thus clearly showing and establishing that it was understood by Congress, in passing this resolution, that the Ontonagon line was abandoned, as well as the Marquette line, and that no part of the grant, either on the Marquette line or Ontonagon line, would remain in force after carrying into effect the provisions of this joint resolution.**

4. It provided that even sections along the "originally located line of the Marquette and Wisconsin State Line Railroad Company" should thereafter be subject to sale, at one dollar and twenty-five cents per acre, except where such sections should fall within six miles of the new-located line (Sec. 4).

This provision also applied to even-numbered sections within the limits of the Ontonagon and State Line branch.

5. On filing in the General Land Office "the *lists* of said railroad lands," with the certificate of the Governor of Michigan, under the seal of the State, that the State and its assigns surrendered all claim to said lands, and that the same have never been pledged, sold or incumbered, the State of Michigan was entitled to receive "*a like quantity of land*, selected in like manner, upon the new line of road as *thus surrendered upon the first line*," to the extent of six sections per mile (Sec. 5).

6. The lands embraced in the "*lists* of surrendered lands" were to be restored to market at public sale.

March 18, 1863, the Legislature of the State of Michigan enacted:

"That the grant of lands conferred by the Board of Control upon the Peninsula Railroad Company, under authority of an act approved March 4, 1861, and upon the relocated route authorized for military purposes by resolution of Congress, approved July 5, 1862, is hereby confirmed unto the said Peninsula Railroad Company. Provided, it shall construct the railroad referred to according to the requirements of the act and resolution of Congress herein referred to" (Session Laws of 1863, 186).

The title of the act is:

"An Act supplementary to an act entitled 'An Act disposing of certain grants of land made to the State of Michigan for railroad purposes by Act of Congress approved June 3, 1856,' approved February 4, 1857, and acts amendatory thereto."

THE ACTION OF THE RAILWAY COMPANY, THE GOVERNOR OF THE STATE OF MICHIGAN AND THE INTERIOR DEPARTMENT TO CARRY OUT THE MENOMINEE SCHEME AND THE JOINT RESOLUTION OF JULY 5, 1862.

By this act the Legislature assented to the change of route proposed, and also to all the conditions imposed by the joint resolution of Congress therein referred to, one of which was that the certificate of the Governor, under the seal of the State, was to be accepted by the Interior Department of the United States as evidence of the surrender by the State of the original grant, upon which to certify to the State the lands embraced in the relocated grant.

We have called attention to the fact that the north boundary of the six miles limits of the Marquette and

State Line branch crossed the Ontonagon line something like fourteen miles north of the Wisconsin State line.

As a condition of receiving lands along the new line the Governor was to file in the General Land Office "the *lists of said railroad lands*," with his certificate of surrender.

There were two lists of lands lying along the Marquette line, between Marquette and the State line, to wit, the $112{,}145\frac{38}{100}$ acres in the *clear* Marquette line limits, and the $41{,}649\frac{25}{100}$ acres in the *common* limits of both branches lying next to the Wisconsin State line. If it had been intended that only the *clear* lands along the Marquette line should be surrendered, there would have been but one list, and the word "*lists*" would not have been used.

If it had been contemplated by the said above-quoted Joint Resolution of July 5, 1862, that the grant for a line of road from Ontonagon to the State line should remain in force, purchasers of even sections along the Marquette line, where they fell within six miles of the Ontonagon line would not have been allowed to change their entry or to take an equal quantity of lands at the minimum price elsewhere, as those lands would have remained within the six miles limits of a contemplated line of road for which a grant had been made. Neither would the act have allowed the sale of lands in even sections that fell within the six miles limits of both lines of road, to have been offered for sale at one dollar and twenty-five cents per acre.

It seems clear that Congress, in passing this Joint Resolution of July 5, 1862, did not contemplate that, after the new plan was carried into operation, there would be any grant remaining for a rail-

road, or that there would be any railroad from Ontonagon to the State line over this route. The surrender of the lands for the Marquette and State Line road would leave the last fourteen miles of the Ontonagon branch without any grant, even if the rest of them were not surrendered. The route of the Wisconsin road that was to meet this at the State line had been changed to the Menominee line by the said Joint Resolution of April 25, 1862, and the Ontonagon line, if built, would terminate in the wilderness, without any southern connection whatever, either at the State line or fourteen miles short of it.

The plan now contemplated was to reach Marquette by railroad from Chicago via the mouth of the Menominee River, and to reach Ontonagon via Marquette and the Marquette and Ontonagon Railroad. This is also indicated by the explanation of the joint resolution on its passage in the Senate. Senator HARLAN, who called up the resolution, stated that authority had been granted to the State of Wisconsin, during the then present session, to relocate a part of the same road to extend up to the line between the two States, and that the passage of this resolution was necessary to keep the line of the road according to the original design and to make the work practical (Cong. Globe, 2d Sess., 1861–2; 37 Cong., part 4, p. 3049, quoted *ante* p. 33, note).

Also, in the debate in the House on the bill to extend the time to complete certain roads in Wisconsin and Michigan (approved March 3, 1865), it was stated that there were originally four roads, now consolidated into two (Cong. Globe, 1865, p. 796). The four roads referred to could be no other than the Bay de Noquet and Marquette, which was to extend from the northern ex-

tremity of Green Bay to Marquette, the Marquette and Ontonagon, the Marquette and State Line, and the Ontonagon and State Line.

May 6, 1863, the Peninsula Railroad Company, for the purpose of a partial compliance with the conditions of the resolution by which the grant was to be relocated, released to the United States all its claim to the lands on the old line sufficient to cover 161,104.38 acres (Rec., pp. 148, 149).

October 21, 1864, the Chicago and Northwestern Railway Company and the Peninsula Railroad Company consolidated into one corporation, under the name of the **Chicago and Northwestern Railway Company.** By such consolidation all the rights, franchises, real estate, lands, land grants, &c., of both the original corporations became vested in the consolidated corporaporation (Rec., p. 138).

February 21, 1867, the Legislature of Michigan, by joint resolution, authorized the Governor to execute and file the certificate of non-incumbrance and surrender contemplated by the Joint Resolution of Congress of July 5, 1862. Said resolution was as follows:

JOINT RESOLUTION authorizing the Governor to execute the certificate of non-incumbrance and surrender of the lands on the original line of the Marquette and Wisconsin State Line Railroad.

1856

Whereas, by Act of Congress, approved June 3d, ~~1865~~, there was made, among other grants to this State, a grant of lands to aid in the construction of a railroad from Marquette to the Wisconsin State line;

And whereas, by joint resolution of Congress, approved July 5th, 1862, a change of the route of said road was authorized, and, in fact, has been made;

And whereas, the company have executed a release of said land to the Governor; therefore,

Resolved, by the Senate and House of Representatives of the State of Michigan, that the Governor be, and he is hereby, authorized to execute and file the

certificate of non-incumbrance and surrender to the United States of the land on the original line of said railroad required by said joint resolution.

Approved February 21st, 1867.

Laws of 1867, Vol. 1, page 317.

January 31, 1868, the Chicago and Northwestern Railway Company, for the purpose of obtaining the certification of lands along the new line, and having succeeded, by consolidation, to the grant as conferred upon the Peninsula Railroad Company, **executed a formal deed of release** to the State all its claim to the lands embraced in the six miles clear limits of the Marquette and State Line branch; also, to those in the common limits of the Marquette and State Line and Ontonagon and State Line branches; and in the common limits of the Ontonagon and State Line and Marquette and Ontonagon roads (Rec., pp. 151 to 153).

NOTE that this released all the lands on both branches except the *clear* lands on the Ontanagon branch, which clear lands were afterwards—to wit, June 17, 1870—released by a subsequent deed as shown below.

May 1, 1868, the **Governor of Michigan executed a certificate of non-incumbrance and surrender to the United States** of the same lands under the seal of the State, and filed the same in the General Land Office, in accordance with the terms of the joint resolution of July 5, 1862 (Rec., pp. 153 to 155). The lands in the *clear* six miles limits of the Ontonagon branch were not embraced in either of these releases.

P. J. Avery, president of the old canal company, and also agent for the State for the selection of lands under the canal grant, having applied to select lands in

the six miles limits of the Marquette and Ontonagon branches of the Chicago, St. Paul and Fond du Lac Railroad, the Commissioner of the General Land Office, **October 6, 1869,** wrote him that the surrender of the lands along the Marquette branch was complete and that selections in those limits could be allowed; but that, before selections could be made along the "abandoned branch line which was to run from the State line to Ontonagon," a release of those lands from the State would be required (Rec., p. 121).

December 6, 1869, the Commissioner of the General Land Office gave similar instructions to the Register and Receiver at Marquette (Rec., pp. 167, 168).

July 13, 1868, the Commissioner of the General Land Office, by letter to the solicitor of the Chicago and Northwestern Railway Company, acknowledged the receipt and filing of the releases from said company to the State, and from the State to the United States, above mentioned, stating that the release was satisfactory, so far as related to "that portion of the branch line from the Wisconsin State line to Marquette," but that a further release of the list of lands embracing 142,430.23 acres certified to the State for the branch line to Ontonagon would be required before the selections for the Chicago and Northwestern Railway Company could be certified (Rec., p. 156).

In answer to the request from the solicitor of the Chicago and Northwestern Railway Company for the lists of lands still required to be surrendered, the Commissioner of the General Land Office sometime between the 25th of April and the 17th of June, 1870, furnished the solicitor of said railway company with the list of

142,430.23 acres granted for the branch line of the Chicago, St. Paul and Fond du Lac Railroad Company to Ontonagon, in Michigan, and on the **17th day of June, 1870,** said Chicago and Northwestern Railway Company, by deed, released all said lands to the State of Michigan, being the lands within the six miles clear limits of the line of road from Ontonagon to the Wisconsin State line (Rec., pp. 158, 159).

August 14, 1870, the Governor of Michigan executed a certificate of non-incumbrance and surrender to the United States of those lands, and the same was filed in the General Land Office (Rec., pp. 161, 162). Before executing said surrender the Governor had asked the advice of the Attorney-General of the State of Michigan, and was advised by him that he was fully authorized to do so (Rec., p. 161). Thereupon, there was certified to the State, for the benefit of the Chicago and Northwestern Railway Company, pursuant to the Joint Resolution of Congress of July 5, 1862, along the new line of road, 390,451.89 acres, or **over 50,000 acres more than had been released** on both the Marquette and Ontonagon lines, besides 127,462.26 acres in addition, which were granted by Act of March 3, 1865, granting four additional sections per mile (Rec., pp. 163 to 165). Also see report of Senate Committee on Public Lands, page 130 of Record, at the bottom.

These several acts were understood by all the parties in interest, to wit, the Chicago and Northwestern Railway Company, the Executive Departments of the State of Michigan and the United States, as extinguishing all rights of the State in

all the lands granted along the old Marquette and State Line and Ontonagon and State Line branches and vesting the title in the United States.

The understanding of Congress also was that these lands were abandoned (see remarks on passage of Joint Resolution of 1862, Cong. Globe, July 2, 1862; also, on the passage of the bill of March 3, 1865, extending time and granting additional lands, Cong. Globe, February 15, 1865, p. 796).

The lands certified for the Chicago and Northwestern Railway Company in exchange for those so surrendered were patented by the Governor to the said railway company (Rec., pp. 177, 178).

After the filing of these certificates of surrender, the agent of the State of Michigan selected lands along the abandoned Ontonagon line, both in the clear limits of the Ontonagon line and the limits common to the Ontonagon and Marquette lines as applicable to the Portage Lake Canal grant. The selections were approved by the Secretary of the Interior, and certified lists were transmitted to the Covernor and filed in the State Land Office.

The old canal company relied on the acts of the State and United States authorities and accepted the lands in satisfaction of its contract, instead of selecting other valuable lands that could then have been selected.

The lands involved in these suits were selected, and approved by the Secretary of the Interior, as appears by the certified lists above referred to (Rec., p. 44; and Donahoe, Rec., p. 6).

In **August, 1874,** all but 5,628 acres, and in **February, 1878,** the full complement of lands

granted for the construction of the canal, by the acts mentioned, had been selected (Rec., pp. 168, 169).

After all these lists (except the last list of 5,628 acres) had been approved, forwarded to the Governor of Michigan, and filed in the State Land Office, **the Governor, on June 25, 1875, executed, delivered and filed the certificate of completion of the canal,** which was required by the Act of the Michigan Legislature, for no other purpose than to vest the title to the lands in the canal company, in order that the company should stand seized and possessed of the said lands "as fully as the State can convey the same" (Rec., p. 98).

This act of the Governor was two years after he had made the claim that the lands embraced in the old Ontonagon and State Line limits still belonged to the State (Rec., pp. 132, 133), of course knowing that it operated as a deed of the lands certified, including those selected in the six miles limits of the Ontonagon and State Line branch, and that it was required for no other purpose.

On the faith of these acts of the Governor and of the Interior Department of the United States, the plaintiff below (the present canal company) purchased these lands in good faith, for a large sum of money, on the mortgage sale, as hereinbefore mentioned, and has held them from that time (Sept., 1877) until the present time, dealing with them as its own property, making leases and conveyances, and paying the taxes thereon (Rec., pp. 102, 103 and pp. 178, 179).

From the year 1867 to the year 1889, on the theory and understanding that said Ontonagon and State Line land grant had been extinguished, the Government sold, within the six miles limits of that railroad line

51,600 acres of land in odd sections, and 78,820 acres in even sections, of which there were patented, up to the time these suits were tried in the Circuit Court, 16,360 acres of lands in odd sections, and 46,680 acres of lands in even sections (Rec., p. 178).

The purchasers of these lands, as well as the officers of the Interior Department of the United States, considered these lands as having been fully revested in the United States, and, as said by the Senate Committee in their report above referred to, with good reason (Rec., p. 131).

THE CLAIM SET UP BY THE DEFENDANTS.

Walter A. Cunningham, the defendant in error in Case No. 305, tendered declaratory pre-emption statement to the Register and Receiver **June 4, 1888,** for the southwest quarter of section twenty-five (25), in township forty-four (44), north, of range thirty-six (36) west, the land involved in his case, alleging settlement May 25, 1888 (Rec., pp. 141, 142). The claim was rejected by the Register and Receiver, for the reason that the land had been selected under the canal grant, Act July 3, 1866 (Rec., p. 142). Cunningham claims to have actually entered and settled on the land on March 28, 1888. When he went upon the land he understood and knew that the land was embraced in a grant to the State for railroad purposes, but hoped that the grant would be removed, and by being on the land he could eventually get it (Rec., pp. 144 and 145). The declaratory statement, with the rejection endorsed upon it, and the reasons therefor, was returned to him. He appealed from the decision rejecting his claim to the Commissioner of the General Land Office, and from the decision of the

Commissioner to the Secretary of the Interior. The rejection was affirmed by the Secretary of the Interior, **March 7, 1890** (see Commissioner's letter, Record, p. 171).

Hugh Finan, defendant in error in Case No. 306, tendered declaratory statement, December 4, 1888, claiming settlement, November 1, 1888, on the northeast quarter of section thirteen (13), in township forty-four (44) north, of range thirty-six (36) west, being the land involved in his suit. His claim was rejected by the Register and Receiver for the same reason as above mentioned (Cunningham, Record, p. 146). At the time of the trial of the cause his appeal from said rejection was pending before the Commissioner of the General Land Office (p. 146). He also understood and knew at the time of his settlement, that the land was covered by a land grant for railroad purposes (Rec., p. 146). Since the trial of the cause, the decision rejecting his claim has been affirmed by the Secretary of the Interior, June 27, 1892.

Michael Donahoe, plaintiff in error in Case No. 307, tendered declaratory statement, April 11, 1883, for the west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-three (23), in township forty-three (43) north, of range thirty-five (35) west, being the land involved in his case. His claim was rejected for conflict with the selection under the canal grant. He appealed to the Commissioner of the General Land Office, and his appeal was there pending at the time of the trial of this cause (Donahoe, Record, p. 15). He also, as testified by him, understood and knew that the land was covered by a grant to the State for railroad purposes, and also knew

that it was claimed as canal land (Donahue, Rec., pp. 14 and 15).

Assignment of Errors in the Cunningham Case (No. 305).

1. In admitting evidence offered by the defendant against the objection of the plaintiff as set forth in the first ten assignments of error in the record (pp. 193, 194). The rulings here referred are found in the bill of exceptions (pp. 104, 105, 106, 107, 108, 109, 110, 111, 115, 142-144).

2. In refusing each of the instructions which the plaintiff asked to be given to the jury, as found in the record (pp. 180-185, inclusive), to which the plaintiff excepted, and as found in the assignments of error numbered 16 to 27, inclusive (Record, pp. 194-200, inclusive). The said instructions are printed in full in the margin (see foot note).

3. The Court erred in giving each of its instructions to the jury, found in the record (pp. 186, 187 and 188), and in the 28th, 29th, 30th and 31st assignments of error, found on page 200 of the record.

4. The Court erred in its said refusal to instruct, and in its said instructions, in holding that the certification of the land in question to the State of Michigan, dated May 19, 1871, being Supplemental List No. 4, approved 22d of May, 1871, by the Secretary of the Interior, was void.

5. It also erred in refusing to hold that the said certificate was in this action conclusive of its own rightfulness, and had the effect to vest the title to the lands named therein in the State of Michigan for the benefit of the canal company.

6. In refusing to hold that the relinquishment of the lands in controversy on the 14th day of August, 1870, by the Governor of the State of Michigan to the United States, and the filing of the lists of the said lands by the Governor on the said 14th day of August, together with his certificate, under the seal of the State, that the State and its assigns surrendered all claims for said lands set forth and described in the said lists thereof (which included the lands in controversy), and that the said lands had never been sold, pledged or otherwise encumbered, and that the action taken there-

under was effectual to revest the title of the said lands in the United States, as particularly asked by the plaintiff's instruction No. 5 (Record, pp. 181, 182).

7. In refusing to hold, as asked in plaintiff's instruction No. 6, that the said State, by reason of the facts stated in said instruction, would be precluded, as against the canal company, to set up title to the lands in question in this suit under the Act of June 3, 1856, granting the same to the State of Michigan for railroad purposes.

8. The Court erred in holding that the Act of March 2, 1889, confirming certain entries and State selections of land, did not relate back to the time when this action was brought for the purpose of maintaining the same.

9. The Court erred in holding that the said Act of March 2, 1889, did not attempt to confirm the plaintiff's title to the land in question under the Act of July 3, 1866.

10. The Court also erred in instructing the jury to find for the defendants.

All the aforesaid instructions asked by the plaintiff and refused, and the said instructions or charge of the Court to the jury, are set forth *totidem verbis* in the margin. *

*** Extract from the bill of exceptions (Record, pp. 180-188).**

306 The foregoing contains all the evidence introduced by either party upon the trial of the aforesaid causes, and thereupon the plaintiff's counsel requested the said circuit court to instruct the jury in each of said causes as follows:

Instructions Asked by the Plaintiff and Refused by the Court.

1. That on the pleadings and evidence in this action the plaintiff is entitled to recover, and you will find a verdict in its favor.

2. The plaintiff claims title and right to recover the possession of the real estate in controversy under the act of Congress of July 3rd, 1866, entitled "An act granting lands to the State of Michigan to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in said State," and under a certification of the said land to the State of Michigan for the benefit of the Portake Lake and Lake Superior Ship Canal Company by the Commissioner of the General Land Office, dated May 19th, 1871, being supplemental list No. 4, approved as follows:

Assignment of Errors in the Finan Case (No. 306).

The rulings in this case on the admission of evidence and in the instructions which the plaintiff asked to be given to the jury and which were refused, and in the instructions of the Court to the jury, are literally the same *mutatis mutandis*, as those in the Cunningham

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"DEPARTMENT OF THE INTERIOR,
"WASHINGTON CITY, D. C., 22*d May*, 1871.

"Approved, subject to the conditions and rights above mentioned.

"C. DELANO, *Secretary*."

The court instructs the jury that inasmuch as the land in question in this suit is embraced in said certification thus approved the same operated to convey the said land to the State of Michigan, and under the said act the said land thus certified inured to the use and benefit of the Portage Lake and Lake Superior Ship Canal Company, whose name was afterwards changed to that of the Lake Superior Ship Canal, Railroad and Iron Company, and as the Governor of the said State, on the 25th day of June, 1875, certified and determined that the said ship canal and harbor mentioned in
307 said act of July 3rd, 1866, and in the Michigan act of March 18th, 1865, entitled "An act to accept a grant of lands by Congress to aid in the construction of the ship canal and harbor at the head of Portage Lake, at its connection with Lake Superior, and to provide for the construction of the same," and the act of March 27th, 1867, accepting the said grant made by the said act of Congress of July the 3rd, 1866, had been constructed by said company, as required by law, and as the plaintiff in this suit has shown that it has succeeded to the title and rights of the said Portake Lake and Lake Superior Ship Canal Company in and to the said land, the plaintiff is entitled to recover the possession thereof in this action from the defendant, and you will accordingly find a verdict for the plaintiff.

3. The supplemental list No. 4 of the said lands introduced in evidence, embracing, among other tracts, the land in question, approved by the Secretary of the Interior on the 22nd day of May, 1871, was as against the said defendant a valid certification of the said lands, and the defendant in this action of ejectment cannot defeat the title and right thus granted to and conferred on the State of Michigan, and through it to the said canal company, by showing that the said lands were improperly selected, certified, and approved to the State of Michigan as aforesaid.

case, with the exception that the Court refused, in the said Finan case, to give the additional instructions asked by the plaintiff numbered 8, 9 and 10, as found in the record in the Cunningham case (pp. 185, 186), which said instructions thus refused as well as the opinion of the refusing the same, and giving the grounds of such action and of its instruction or charge to the jury to find for the defendant, as well as its said charge or instruction to the jury, are set forth *totidem verbis* in the margin. (See foot note.)

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4. Under the said act of Congress of July 3rd, 1866, the grant of lands for the benefit of the said ship canal company was of two hundred thousand acres of land in the Upper Peninsula of the State of Michigan, to be selected from lands to which the right of pre-emption or homestead had not attached, which selection was to be made by an agent or agents appointed by the Governor of the said State, subject to the approval of the Secretary of the Interior,
308 which, when so located, should inure to the use and benefit of the said ship canal company, in accordance with an act of the Legislature of the State of Michigan conferring the lands granted to the said State on the said company under this legislation. It is in proof that the land in question in this suit was selected to fill the said canal grant of July the 3rd, 1866, by an agent appointed by the State of Michigan, and that the said selection was approved by the Secretary of the Interior on the 22nd day of May, 1871, and the list containing the said land and the said approval were duly certified to the State of Michigan for the benefit of the said canal company. This act of July 3rd, 1866, conferred upon the Secretary of the Interior the power to determine what lands were of the description granted by the act of July the 3rd, 1866, and that decision as embodied in the said list embracing the land now in controversy, and approved by the Secretary of the Interior and accordingly certified to the State of Michigan, is conclusive in this action of the rightfulness of the said certification, and had the effect in law to place the title to the lands thus approved and certified to the State of Michigan in the State of Michigan for the benefit of the said canal company.

5. It appearing that under the joint resolution of Congress of July the 5th, 1862, entitled "A joint resolution relative to a certain land grant for railroad purposes made to the State of Michigan in 1856," the Chicago and Northwestern Railway Company (the successor in interest of the Ontonagon and State Line Railroad Company and of the Marquette and State Line Railroad Company, consolidated into the Chicago, St. Paul and Fond du Lac Railroad Company, and the successor in interest of the Chicago, St. Paul

ARGUMENT.

I.

We submit in the outset that the defendants below cannot be heard to dispute the validity of the conveyance from the United States to the State of Michigan, and by the

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and Fond du Lac Railroad Company and of the Peninsula Railroad Company), by instrument dated the 14th day of June, 1870,
309 remised, released, and quitclaimed to the said State of Michigan and its assigns all the right, title, and interest it then had or ever had in and to the lands in controversy, and that afterwards, to wit, on the 14th day of August, 1870, the Governor of the State of Michigan, under the great seal thereof, filed in the General Land Office, at Washington, the lists of the said railroad lands, including the land in controversy in the present action, which had been theretofore selected and certified under the act of Congress of June 3rd, 1856, entitled "An act making a grant of alternate sections of the public lands in the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes," together with a certificate, under the seal of the State, that the State and its assigns surrendered all claim to the said lands set forth and described in the lists thereof, which included the land in controversy in this action, and that the same had never been pledged, sold or otherwise incumbered; and it further appearing that under the said joint resolution of July the 5th, 1862, the State afterwards selected for the new line of railroad mentioned in the said joint resolution of July the 5th lands in quantity greater than the lands thus surrendered, and that the lands so selected were afterward certified by the United States to the State of Michigan for such new line and were afterwards patented by the said State of Michigan to the said Chicago and Northwestern Railway Company, the court instructs you that said lands thus relinquished and surrendered by the Governor having afterwards been selected under the canal grant of July 3rd, 1866, by an agent appointed by the Governor and afterwards approved by the Secretary of the Interior and certified to the State of Michigan for the benefit of the said canal company, such certification thereof by the Secretary of the Interior was not
310 void.

6. Said supplemental list No. 4 of lands selected by the State of Michigan under the act of Congress of July the 3rd, 1866, which was approved May 22nd, 1871, by the Secretary of the In-

latter to the plaintiff, because they do not connect themselves with the title, but are mere intruders.

The grant to the plaintiff, the canal company, is from the United States. The only claim of the defendant is that the land is still land of the United States, and that he has a *right to acquire the same* under the pre-emption

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terior, as a portion of the land to aid in the construction of the harbor and ship canal at Portage Lake, Keweenaw Point, to the State for the benefit of the canal company under said act of July 3rd, 1866, is not void on the ground that the title to the said lands thus selected (which included, among other tracts, the one in controversy in this action) was in the State of Michigan under the railroad act of June the 3rd, 1856, for the State by reason of its acts under the joint resolution of Congress approved July the 5th, 1862, and the surrender to the United States of the said lands as railroad lands under section 5 of the said joint resolution and the subsequent selection by an agent appointed by the Governor of Michigan of the said land under the canal grant of July the 3rd, 1866, in order to satisfy the State's obligation to the canal company for the construction of said canal, and the selection in like manner by the State of a like quantity of other lands in the place of the lands surrendered upon the originally located route for the benefit of the new line of road to the Wisconsin State line near the mouth of the Menominee river, which lands thus selected the State obtained from the United States and subsequently patented to the Chicago and Northwestern Railway Company for the construction of said new line of railroad to or near the mouth of the Menominee river would be precluded as against the canal company to set up that the State held title to the said lands embraced in said supplemental list No. 4,

311 certified and approved as aforesaid, and the defendant cannot defeat the plaintiff's title in this action by setting up that at the date of the selection of the lands in controversy under the canal grant of July the 3rd, 1866, and at the date of the approval of the said selection by the Secretary of the Interior, May 22nd, 1871, the title to the said land was in the State and not in the United States.

7. Even if, independent of the act of Congress approved the 2nd of March, 1889, entitled "An act to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said State," the plaintiff had no title to the land in controversy in this action, nevertheless the said act of March the 2nd, 1889, confirms the title of the plaintiff to the said

laws; but his attempt to do so, or his first assertion of such right was long subsequent to the grant to the plaintiff. The title is either in the plaintiff under the grant which was complete at least twenty years ago, or it is in the Government. If the officers of the Government acted erroneously in granting or certifying the land or exceeded their authority, the right to take

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land under supplemental list No. 4 of land selected by the State of Michigan under the act of Congress — the 3rd ——, 1866, and approved by the Secretary of the Interior May 22nd, 1871, as a portion of the lands to aid in the construction of a harbor and ship canal at Portage Lake, Keweenaw Point, and entitles the plaintiff to recover in this action the possession of the land in controversy against the defendant.

The said circuit court refused to instruct the jury in accordance with any or either of the above requests, and to each of said rulings and refusals the said plaintiff's counsel then and there excepted.

And said plaintiff's counsel further requested the said circuit court to instruct the jury in the case of The Lake Superior Ship Canal, Railway and Iron Company against WALTER CUNNINGHAM as follows:

7. Even if, independent of the act of Congress approved March the 2nd, 1889, entitled "An act to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Mar-
312 quette to Ontonagon, in said State," the plaintiff had no title to the land in controversy in this action, nevertheless the said act of March the 2nd, 1889, confirms the title of the plaintiff to the said land under supplemental list No. 4 of lands selected by the State of Michigan under the act of Congress of July the 3rd, 1866, and approved by the Secretary of the Interior May 22nd, 1871, as a portion of the lands to aid in the construction of the harbor and ship canal at Portage Lake, Keweenaw Point, and entitles the plaintiff to recover in this action the possession of the land in controversy against the defendant unless the defendant had a *bona fide* pre-emption claim thereon on the 1st day of May 1888, arising or asserted by actual occupation of said land under color of the laws of the United States.

8. The burden is on the defendant to prove that he had a *bona fide* pre-emption claim on the land in dispute on the 1st day of May, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, and the evidence produced by the defendant in this action in support thereof is insuffi-

advantage of that, if it exists at all, is in the United States. *The defendant in either of these cases has not acquired, and under any existing laws, cannot acquire, that right.*

In the case of Erhardt vs. Hogaboom, 115 U. S., 67, the plaintiff claimed title under a patent from the United States. The defendant was in possession of a

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cient to establish that he had on May 1st, 1888, such a pre-emption claim on the land in dispute as is provided for and confirmed by the last sentence of the third section of the said act of March the 2nd, 1889.

9. In order to bring the defendant's claim as a pre-emptor on the land in dispute on May 1st, 1888, within section 3 of the act of Congress approved March the 2nd, 1869, it is necessary that the said claims should, on the 1st day of May, 1888, have been a *bona fide* pre-emption claim arising or asserted by actual occupation of the land under color of the laws of the United States, and it is not such a claim if the defendant believed, as he has testified on this
313 trial, that at the time he settled upon and improved the said land it was not then public land of the United States, but was part of a then unforfeited grant to the State of Michigan for the benefit of a railroad company.

10. The defendant, to establish his claim as a pre-emptor on the land in dispute on May 1st, 1888, introduced in evidence a declaratory statement containing an endorsement therein by the register and receiver of the land office as follows:

"*Declaratory Statement.*

I, Walter A. Cunningham, of the township of Iron River, Mich., being a citizen of the United States, and twenty-one years of age, have, on the twenty-fifth day of May, A. D. 1888, settled and improved the southwest quarter of sec. 25, town. 44 north of range 36 west, containing 160 acres, which land has not yet been offered at the reduced price and thus rendered subject to private entry; and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th of Sep., 1841.

Given under my hand this 25th day of May, A. D. 1888.

WALTER A. CUNNINGHAM.

In presence of—

YOUNG CAMPBELL.

portion of the land covered by the patent, and without in any way connecting himself with the title, sought to show that it was swamp and overflowed land within the meaning of the Act of September 28, 1850, and passed to the State by that act. Mr. Justice FIELD, in delivering the opinion of the Court, said:

"He was, as to the 20 acres, a simple intruder, without claim or color of title. He was, therefore, in no

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P. S.—I have lived with my family on the above land since the 28th day of March last. I enclose $2.00.

(Indorsement.)

U. S. LAND OFFICE,
MARQUETTE, MICH., *June* 4, 1888.

The within application, with the required fee tendered, was this day rejected, for the reason that the land applied for has been selected by and certified to the State of Michigan for the P. L. & L. S. S. C. Co., act July 3, 1866, list No. 4, approved May 22, 1871.

SAM'L E. BYRNE, *Register.*
M. H. MAYNARD, *Receiver.*"

314 This negatives and disproves the right of the defendant to claim in this suit that he had a pre-emption claim on the land on the 1st day of May, 1888.

11. The land in controversy having been certified and approved to the State of Michigan by the Secretary of the Interior on May 22nd, 1871, under the canal grant of July 3, 1866, and by the State disposed of to the canal company as part compensation for the construction of a canal, to the completion of which, according to law, the Governor of the State duly certified in 1875; the United States never having taken any steps to set aside the said certification and approval of the Secretary of the Interior of May 22, 1871; the State of Michigan having received under the joint resolution of July 5, 1862, to aid in the construction of the new line of railroad therein mentioned from Marquette to the Wisconsin State line at or near the mouth of the Menominee river other lands in the place of all those which were embraced in the lists surrendered by the Governor to the United States under the said joint resolution of July 5, 1862 (which lists of surrendered lands embraced and described the land in controversy in this action), and the State having afterwards patented such other lands to the Chicago and Northwestern Railway Company as having been earned by the construction of the said new

position to call in question the validity of the patent of the United States for those acres, and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it. A patent of the United States, regular on its face cannot in an action at law, be held inoperative as to any lands covered by it, upon parol testimony that they were swamp and overflowed, and hence *passed to the State under the grant of such land on her admission to the Union.*"

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line of railroad; the State not having selected any other lands for the canal company than those approved May 22, 1871, as aforesaid, to the State under the canal grant or compensated the canal company for the construction of the said canal in any other way than by the lands selected for it under the act of July 3, 1866, and certified and approved to the State under such selections—such being the status of the lands in controversy on May 1, 1888, the act
315 of March 2, 1889, does not validate or confirm the defendant's claim thereon or thereto as a pre-emptor.

And said circuit court refused to instruct the jury in accordance with either or any of said requests, and to each of said refusals said plaintiff's counsel did then and there except.

And the said plaintiff's counsel further requested said circuit court to charge the jury in relation to said cause of The Lake Superior Ship Canal, Railway and Iron Company against **HUGH FINAN,** as follows:

8. The defendant having testified on the trial, and it being a conceded fact in the case, that he did not settle upon or improve the land in controversy in this action or otherwise make a pre-emption claim thereon until after the 1st day of May, 1888, he is not within the provisions of the 3d section of the act of March 2, 1889, since that section of the said act only extends to a *bona fide* pre-emption claim on May 1st, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States.

9. As against the defendant the act of March 2, 1889, confirms the title and right of the plaintiff to the land in controversy under supplemental list No. 4, selected by the State of Michigan under the act of July 3, 1866, for the benefit of the canal company, which list was approved by the Secretary of the Interior May 22nd, 1871, and certified to the State of Michigan and entitles the plaintiff to a verdict in its favor for the recovery of the land in controversy from the defendant.

10. The land in controversy having been certified and approved to the State of Michigan by the Secretary of the Interior on May 22, 1871, under the canal grant of July 3, 1866, and by the State disposed of to the canal company as part compensation for the
316 construction of the canal, to the completion of which according to law, the Governor of the State duly certified in 1875;

In this case the defendant, who is a mere intruder, seeks to show that the land had passed to the State of Michigan under a prior grant, and that the title still remained in the State at the time of its selection, and at the time this suit was commenced. The plaintiff shows a patent (or its equivalent) regular on its face. The

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the United States never having taken any steps to set aside the said certification and approval of the Secretary of the Interior of May 22, 1871; the State of Michigan having received under the said joint resolution of July 5, 1862, to aid in the construction of the new line of railroad therein mentioned from Marquette to the Wisconsin State line at or near the mouth of the Menominee river other lands in the place of all those which were embraced in the lists surrendered by the Governor to the United States under the said joint resolution of July 5, 1862 (which lists of surrendered lands embraced and described the land in controversy in this action), and the State having afterwards patented such other lands to the Chicago and Northwestern Railway Company as having been earned by the construction of the said new line of railroad; the State not having selected any other lands for the canal company than those approved May 22, 1871, as aforesaid, to the State under the canal grant or compensated the canal company for the construction of the said canal in any other way than by the lands selected for it under the act of July 3, 1866, and certified and approved to the State under such selections—such being the status of the lands in controversy on May 1, 1888, the act of March 2, 1889, does not apply to defendant's case or validate or confirm the defendant's claim thereon or thereto as a pre-emptor.

But the said circuit court refused to instruct the jury in accordance with any or either of said requests, and to each of such refusals the said plaintiff's counsel did then and there except.

Court's Opinion and Charge to the Jury.

And thereupon the said circuit court, by the Hon. H. F. Severens, district judge, declared and delivered his opinion upon said causes as follows:

317 "In the Cunningham case it would be unprofitable to restate our own views upon the principal questions. The court is constrained by the obligations of judicial decorum to hold that the release of the title to the clear lands on the Ontonagon and State Line road, in which this tract was situated, executed by the Chicago

defendant is not in a position to call in question the action of the officers of the Land Department in issuing it, and to throw upon the plaintiff the burden of vindicating such action.

The land, it is claimed, had, in 1856, been granted to the State for another purpose. But by the terms of the granting act the grant was subject to be defeated

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and Northwestern Railway Company and by the Governor of the State of Michigan to the United States was unauthorized by law, and the selection of such lands for the canal company and the certification thereof by the Secretary of the Interior was void.

If this land was confirmed to the present canal company by the act of 1889, while it might relate back to the date of selection for some purposes, it would not do so for the purpose of maintaining an action brought in the meantime. To sustain the action of ejectment the plaintiff must have had title at the commencement of the suit, and if it had not then a title it cannot proceed upon a title subsequently perfected.

The verdict in that case must therefore be for the defendant.

IN THE FINAN CASE the land, as in the Cunningham case, is in the clear limits of the Ontonagon and State Line Branch. The title stands in the same plight as in the Cunningham case; but the suit was commenced since the act of March 2, 1889, was passed, and it becomes necessary to decide whether the 3rd section of that act operated to confirm the title of the canal company to the land in question. If it were not for the express mention of the claims of the canal company in section 2, we should be prepared to hold, upon the liberal construction which should be given to statutes of this character, that the title of the plaintiff was confirmed by the provisions of section 3.

318 It is hard to understand why Congress should have excluded one party from the scope of the justice which it was endeavoring to secure to those who had purchased the forfeited lands for value under color of lawful authority, supposing they were acquiring a valid title, and have laid the scourge upon that one.

But it is a question of construction, and my brother Sage is of opinion that the specific mention of the canal company's claims in section 2 brings the subject under the rule which excludes the particular matter from the operation of the general provision, and while I have serious doubt whether the claim of the canal company in respect to these lands is so specifically dealt with and disposed of by the 2nd section as to exclude it from the equity generally accorded by section 3 to all persons coming within the conditions

by a condition subsequent, in which case the lands would revert to the United States. Whether any piece of land that is applied for is embraced in the grant, or, if embraced in it, has reverted to the United States, are mixed questions of law and fact, to be decided by the Land Department in every case. The issue of the patent is such decision and adjudication.

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there mentioned, I shall, with considerable hesitation, however, concur in his construction.

This conclusion leaves this case exposed to the opinion of the circuit judge in the Cunningham case, and there must be a verdict for the defendant in this case also."

And the opinion of the court so pronounced by the Hon. H. F. Severens was supplemented by Hon. George R. Sage as follows:

"I don't know that it is necessary for me to add anything to the statement of my brother Severens.

This act of March 2, 1889, contains provisions which are incongruous and difficult of construction, and I have hesitated to express an opinion at all in conflict with that to which my brother was inclined and rather preferred to defer to his opinion and let the ruling of the court be accordingly, but as he prefers otherwise so it is.

319 I am not able myself to see how it is possible to give the effect to the provisions of the third section which would confirm the title of the canal company without thereby setting aside altogether the provisions of the second section, and that, as I understand it, would be in conflict with the rule of construction applicable to such cases as this, where there is a particular provision relating to one party with whom the law deals, and a general provision relating to all or to all excepting that party or to all apparently, and they are in conflict. I understand that the particular provision must prevail; that is the duty of the court, as it is in constructing a contract, to take up the act in its entirety and so construe its provisions as to make it effective, and I am not myself able to see how that can be done in this instance and treat the third section as confirming the title of the canal company. I don't understand that this act was intended in any sense, however, to be hostile or adverse to the canal company. Perhaps what Congress intended would have been more exactly and fully expressed and provided for if it had given to the canal company the right to bring suit against the United States for a confirmation of its title or to quiet its title.

In the case of the Newport & Cincinnati bridge, which the company proposed to construct at the height of 78 feet above low-water mark, Congress interposed before the superstructure was placed

If erroneous, it can be corrected at the instance of a party whose rights are affected by it. An intruder claiming no rights under the State cannot be heard to question the decision.

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upon the piers and by special act required that the bridge be constructed at the height of 100 feet above low-water mark, but in the same act it provided that the company should have the right to file its bill against the United States for the equitable relief which, upon the facts and circumstances, it might be entitled to.

320 I understand in this case that Congress intended to leave this company and the Ontonagon Company, as to its claims for land which it had selected and as to the contests with those who are holding adversely or claiming adversely to it, without being affected one way or the other by this act, leave it exactly where they found it, and it is upon that view that I think the third section does not confirm the title of the canal company."

Peremptory Direction to the Jury.

And thereupon the said circuit court instructed the jury as follows:

"GENTLEMEN OF THE JURY: These several cases resolve themselves into questions of law, and there remains no question of fact to be decided by the jury. The ruling of the court upon matters of law involved has disposed of the whole subject-matter of the controversy in the several cases. Nevertheless, the jury being here, it is necessary to take a formal verdict.

The court instructs you that upon the law of this case, speaking now of the Cunningham case, your verdict should be for the defendant.

* * * * * * * *

In regard to the Finan case your verdict should be for the defendant. The clerk will take the verdict in the several cases."

Plaintiff's counsel then and there excepted to the said instructions of the court directing the jury to render a verdict in favor of the defendant in the case of the said plaintiff against Walter A. Cunningham, and also excepted to the ruling of the court directing a verdict in favor of the defendant in the case of said plaintiff against Hugh Finan.

321 Thereupon, under the instruction of the court as aforesaid, the said jury immediately returned a verdict against the plaintiff and in favor of the said defendant, Walter A. Cunningham, and also returned a verdict against the said plaintiff and in favor of the said defendant, Hugh Finan.

The same principle is announced and applied in:

Hoofnagle vs. Anderson, 7 Wheat., 212.
Cooper vs. Roberts, 18 How., 173.
Field vs. Seabury, 19 How., 323.
Spencer vs. Lapsley, 20 How., 264.
Cromelin vs. Minter, 9 Ala., 394.
Doll vs. Meador, 16 Cal., 295.

In the case last cited the plaintiff, in an action of ejectment, claimed under a patent from the State of California of internal improvement lands granted to the State under the Act of September 4, 1841. The defendant in possession offered to show that the lands never passed from the United States to the State, because it was a town site, and so excepted from the grant. Chief-Justice FIELD, delivering the opinion of the Court, says:

"Undoubtedly, a patent issued by the Governor for any land not embraced in the grant to the State would be void for want of power to convey. We do not question this proposition; we affirm it to be sound. The point here is the *status* of the party who can raise any question as to its validity, when it is regular on its face. Nor do we question the further proposition that the defendant might have disproved the evidence of title furnished by the patent by showing that the land in question was not included in the act of Congress, or was within the exceptions contained in the act of this State. We only annex to the proposition the qualification that to do this he must first have brought himself in some privity with the common source of title. If he were a mere intruder, not possessing any claim of title, either from the General or State Government, he would not be in a position to question the regularity and correctness of the action of the officers of the State in the selection of the lands or the issuance of the patent. Until some one appears prepared to trace title to himself from a common or paramount source, parties who are clothed with the solemn evidence of title furnished by the patent of the State may rest in security, without fear of any successful disturbance, in the enjoyment of the property held by them."

The defendant below shows no right. He only claims to have *tendered* a pre-emption declaration, which has been rejected. He appealed from the rejection, and the decision of the local land office was affirmed. Such pre-emption claim confers no right against the Government.

Frisbie vs. Whitney, 9 Wall., 187.

The latest case in which this question is considered is that of Doolan vs. Carr, 125 U. S., 618. This was an action of ejectment brought by Carr against Doolan and another for a tract of land, claiming through a patent of the United States to a railroad company and a conveyance from the railroad company to himself. The defendant offered evidence to show that the patent was void because the land was embraced in a Mexican grant at the time of the railroad grant under which the patent was issued.

The majority of this Court held that the Court erred in excluding the evidence on the objection made, which was as follows:

"That the United States Patent cannot be collaterally attacked in this action; that it can be attacked by bill in equity only; that said United States Patent, and the recitals therein contained, are conclusive evidence in this action; that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent, and taken in connection with the deed from the railroad company to the plaintiff, is conclusive evidence of the plaintiff's rights to recover."

And, also, that the Court erred in instructing the jury that the patent was conclusive of the rights of the parties in that case.

Chief-Justice WAITE dissents from the opinion on the well-established principle that we have been contending for.

The Chief-Justice considers that it appeared in the record that the defendants in the ejectment case were intruders; that they had no rights upon the land other than that they had offered to pre-empt them, and their pre-emption claims had been rejected on account of their patent to the railroad company, precisely as the defendant in this case claims that he offered to pre-empt land, and his pre-emption claim was rejected, as he claims, erroneously. The Chief-Justice shows, by authority cited, that such an attempted pre-emption does not confer upon the defendant any right to attack the *prima facie* case made by the United States Patent, and certainly gave the defendants no right to represent the United States in a suit to avoid the patent which had been issued. The Chief-Justice concurs with the majority of the Court in all propositions of law; nor do the majority of the Court, in any particular, question the propositions of law advanced by the Chief-Justice. The only difference between the Chief-Justice and the majority of the Court is that the Chief-Justice conceives that the record raises the question whether the defendants are in a position to attack the patent, whereas the majority of the Court evidently do not consider that the record raises that question.

It is certain that the objection made to the introduction of the testimony does not intimate any such ground of objection, and, therefore, no such question was passed upon by the Court below and was not before this Court for decision. The majority of the Court did not pass upon that question, but hold that the patent could be attacked where it was void for want of jurisdiction to issue it, but without stating under what circumstances it might be attacked.

The opinion of Chief-Justice WAITE, then, supposing

the question discussed to be properly in the case, as he conceived it to be, being unquestionably the law, it presents a case precisely like this : The patent issued by the United States purported to convey land which, at the time of its issue, or at the time of the grant, was not known as public lands of the United States, and no more within the jurisdiction of the Interior Department than the land in question, even granting that the title, at that time, was in the State of Michigan under the railroad grant. Yet, it was held by the Chief-Justice that parties who had attempted to pre-empt the land subsequent to the patent, and whose pre-emption claims had been rejected, had no standing whatever to contest the patent and defend their possession against it.

By an examination of the printed record in that case, it will be seen that the point upon which the Chief-Justice dissented was not raised in the trial court, nor passed upon by it. The only difference between the Chief-Justice and the other Justices was that the Chief-Justice thought this question was presented by the record, while the other Justices did not.

But the evidence offered and rejected in the Dolan case would have shown that the land was subject to pre-emption at the time the defendants offered their pre-emption declarations, and therefore they had a *right* to acquire a title from the United States. But in these cases the evidence offered by the defendants below, if it proves what they claim, shows that the land was not sublect to pre-emption, being State land. Therefore, on their own theory, they have no standing to attack our title.

II.

But, supposing that the defendant can be heard to question the validity of the patent or certification through which the plaintiff claims, we submit that the original canal company acquired a good title from the State and Government, and that the title acquired by the plaintiff through the mortgage sale, as aforesaid, is unassailable.

The contention of the defendants is that the Michigan and Congressional resolutions authorizing the exchange of grants, and the conveyance of the original grant back to the United States, do not, *in terms*, mention the Ontonagon branch, so that the releases by the Governor of the lands within the granted limits of the Ontonagon branch were without legislative authority and void.

1. These joint resolutions, properly construed, read in connection with the granting act of 1856, and the Act of the Michigan Legislature of March 4, 1861, and of March 18, 1863, include both branches, and the construction placed upon them by the Secretary of the Interior and the Governor was the correct one; and the acts of the Governor of Michigan in surrendering the lands, and of the Secretary of the Interior in certifying them to the State under the canal grant, were duly authorized.

The grant of lands to the State by the Act of Congress, June 3, 1856, was a single grant from the "last two named places [Marquette and Ontonagon] to the State line." The purpose of it was to provide for a railroad in the upper peninsula that should, in the language of the Act of the Michigan Legislature, March 4, 1861, "connect Lake Superior with the system of railroads in Wisconsin."

The grant was divided by the State Legislature and conferred upon two companies, but by the consolidation of these companies immediately afterwards it became a unit and remained such ever after until its surrender.

The line in Wisconsin from Fond du Lac to the State line was an essential part of the system, without which it would be utterly impracticable and could never have been contemplated. No other line of railroad in Wisconsin running northerly to the State line was in contemplation at that time, or for many years thereafter. At the time of the passage of the Michigan and Congressional resolutions no other line in Wisconsin, to meet the line from Ontonagon or Marquette, had been dreamed of. When the Wisconsin line was changed, it became necessary to change the point where the Michigan branch or branches would reach the Wisconsin line at the State boundary between Wisconsin and the upper peninsula. It also became necessary to change the line of the road in the upper peninsula, and necessary for the State to give up the grant for the original line of the Michigan branches, in order to receive a grant for the new location to the mouth of the Menominee. The line from Marquette to the mouth of the Menominee River would run in a direction almost opposite that of the originally located line, and

Marquette would be almost on a direct line from Ontonagon to the mouth of the Menominee River. It was neither practicable nor desirable to build an independent line from Ontonagon to this point, and it was never intended. The adoption of the new plan necessarily involved an abandonment of the original land grant, and the selection of a new one. All these known facts must, of course, be taken into consideration in construing these joint resolutions and legislative acts.

As said by this Court, in the case of Winona R. R. vs. Barney, 113 U. S., 625, to ascertain the intent of legislative acts

" we must look to the condition of the country when the acts were passed, as well as the purpose declared on their face, and read all parts of them together" (S. P., United States vs. Union Pacific R. R. Co., 91 U. S., 72, 81).

Considering this grant in the light of things existing at the time, it is clear that the intention was, as we have said, to provide for a single railroad system of which the Wisconsin line and the line from Marquette and Ontonagon to the State line, were necessary parts. Besides, the newly-located line required some 50,000 acres more than what was originally granted for the Marquette and Ontonagon branches together.

Clearly it was the intention of Congress and the State, in passing those joint resolutions, to provide for the surrender of all the lands originally granted for this railroad system in 1856, on both the Marquette and Ontonagon branches, before certifying to the State, not only an equal quantity of land for the new line, but 50,000 acres more. Had it been the intention of Congress to leave the grant in force for the Ontonagon line,

they would have provided for a line of road in Wisconsin to meet it at the State line. Had such been their intention, the joint resolution of July 5, 1862, would have excepted the lands lying within the six miles limits of that line from the requirement that the "lists of said railroad lands" be filed in the General Land Office with the certificate of surrender and non-incumbrance, so as to leave the grant for that road from Ontonagon to the State line intact instead of cutting it off fourteen miles short of the State line.

If such had been the intention the right of parties who had purchased even sections within the six miles limits at $2.50 per acre to change their locations to the six miles limits in the new line, or to take a like quantity of other lands subject to sale at $1.25 per acre without further payment, would have been restricted to locations not within six miles of the Ontonagon line as well as to those not within six miles of the new line; and the provision reducing the price of even sections not within six miles of the new line to $1.25 per acre would have been similarly restricted.

While the language of the joint resolution of Congress only mentions the railroad from Marquette to the State line, the end in view as expressed in section one, was that "of securing a railroad available for military purposes, from Green Bay to the *waters of Lake Superior.*"

This resolution provided for a change in the railroad system which, if acted on, would render the Ontonagon branch impracticable, and leave it without any grant, or at least without one extending to the State line, and without any line of railroad, either then constructed or in contemplation to connect with it.

The Michigan Legislature, by the aforementioned

Act of March 18, 1863, consented to the change of route as provided by the Joint Resolution of Congress July 5, 1862, and accepted the conditions therein contained. That of itself was sufficient authority for the Governor to execute the surrender under the seal of the State.

The Legislature, by the above-mentioned Act of February 21, 1867, expressly authorized the Governor to execute the surrender contemplated by the Congressional resolution. No reservation was named by that act, but the Governor was authorized to file such "certificate of non-incumbrance and surrender to the United States of the land on the original line of said railroad," and that authority certainly extended to the surrender of all the lands on the line from Marquette *to the Wisconsin State line.*

The Legislature, by the last-mentioned act, recognized the fact that a release had already been executed. Although that release was erroneously recited it could have referred to no other than the release by the Peninsula Railroad Company executed May 6, 1863 (Rec., p. 148). It is not clear how the Peninsula Railroad Company in executing that release arrived at the exact quantity of land mentioned therein, to wit, 161,104.38 acres of land; but it would have required more than the land embraced in the two lists, certified for the Marquette and State Line road, to wit, 112,145 acres in the clear Marquette and State Line limits, and the 41,649 acres in the limits common to the Marquette and State Line and the Ontonagon and State Line branches. It cannot be supposed that the Legislature was ignorant of the existence of these lists, and of the quantity of lands covered by them. They certainly must have recognized the fact that the con-

templated surrender covered the lands embraced in both these lists, and more.

"The intention of the law maker constitutes the law. A thing may be within the meaning and not within the terms, or within the terms and not within the meaning. What is implied in the statute is as much a part of it as what is expressed."

U. S. vs. Babbitt, 1 Black (U. S.), 55-61.
Ind. R. R. vs. Horst, 93 U. S., 291-300.
Leavenworth R. R. vs. U. S., 92 U. S., 742.
Burbett vs. Bartlett, 95 U. S., 639.
U. S. vs. Hudson, 10 Wall., 406.
Washburne vs. Miami Co., 2 Fed. Rep., 638.
Sisters vs. Detroit, 9 Mich., 99, top and cases cited.

This rule of construction applies to legislative grants to corporations, and to the interpretation of legislative contracts, the same as to other statutes.

2 Morawetz Corp., Sec. 317, end.
Thomas vs. R. R. Co., 101 U. S., 82.
The Binghamton Bridge, 3 Wall., 51, 74, 75.
U. S. vs. B. & M. R. R., 4 Dillon, 297; 98 U. S., 341.
K. C. R. Co. vs. Attorney General, 118 U. S., 694.

2. The State Executive and the Secretary of the Interior, the former in making the surrender and the latter in accepting it and approving the selection of lands under the canal grant, necessarily passed upon mixed questions of law and fact, and the correctness of their decision cannot be assailed collaterally.

In executing the laws of the State the Governor must necessarily decide *for himself* the extent of his duties,

construing the law, and must also *pass upon the facts* upon which he bases his action. Acting thus within the scope of his authority, his decisions, although erroneous, cannot be questioned, except at the instance of the parties injured by his decision. No one but the State itself, or the United States, was in a position to question the correctness of the Governor's action in making this surrender.

It has been urged that the Ontonagon and State Line road had rights which could not be affected by the supposed unwarranted action of the Governor and Secretary of the Interior. But the Ontonagon and State Line Railroad was a nonentity. There was no individual, or company, having, or claiming, any interest in the lands pertaining to that grant. The United States as grantor had a right to insist upon the execution of the trust. The State was interested as trustee in the question of whether the trust should be executed as originally made or changed. All rights of the original railroad company had passed to the Chicago and Northwestern Railway Company, or to the Peninsula Railroad Company, both of which companies were consenting to and urging the action that was taken. The people of the State and of the United States were represented by the respective governments. So we insist that we are correct in saying that, after the surrender by the respective railroad companies, there was no party interested in this grant, or in a position to question the Governor's action, aside from the State and the United States.

The Governor, in the discharge of his duty, was necessarily required to decide what lands were embraced in the grant of land mentioned in the Michigan Joint Resolution February 1, 1867, and in the

Act of the Legislature of March 18, 1863. The lands were not specified in the resolution, and it was for him to determine what lands were referred to.

It was also necessary for him to construe the resolution, and in connection with it the Congressional Joint Resolution of July 5, 1862, in the light of the condition of things existing at the time, and the facts to which they applied, and to determine his duty under them both. It being in the line of his duty to make these decisions, he had jurisdiction, and his decision is final until reversed or annulled in some proceeding, at the instance of some party in interest, whose rights had been prejudiced by such decision. The Governor did act, after careful consideration, and on the advice of the Attorney-General.

Under the canal grant, also, the Governor was authorized and required to appoint an agent for the selection of lands applicable to that grant. The Granting Act of 1865 provided that the lands were to be selected "by an agent or agents appointed by the Governor of said State." The Michigan Legislature accepted the grant with that condition. Such agent was appointed, and his acts in pursuance of the Act of Congress, as accepted by the Legislature of the State, was the act of the State.

JURISDICTION *is "the power to hear and determine" the particular cause or matter involved.*

U. S. vs. Arredondo, 6 Pet., 709.
Grignon's Lessee vs. Astor, 2 How., 338.
Beauregard vs. New Orleans, 18 How., 502, 503.
Johnson vs. Townsley, 13 Wall, 72, 83.
Shepley vs. Cowan, 91 U. S., 330.
U. S. vs. Schurtz, 102 U. S., 378.
Steel vs. Smelting Co., 106 U. S., 447.

The Secretary of the Interior, in passing upon these selections, was necessarily required to decide whether the lands embraced in such selections were subject to be taken for the canal grant. This was a mixed question of law and fact. The location of the lands, and the lines of other railroad grants, were questions of fact for him to decide. Also the question whether lands had been surrendered by the State, or the rights of the State had been otherwise extinguished, was one of mixed law and fact, which he must necessarily decide, and was therefore within his jurisdiction.

Upon that question he had the certificate of the Governor, under the great seal of the State, setting forth that the State of Michigan had surrendered them, and that they had not been pledged, sold or encumbered, which was all the evidence to be required by him under the Joint Resolution of Congress.

Joint Resolution on July 5, 1862, Section 5.

Upon that certificate alone the Secretary of the Interior had authority to act and decide the question whether the State had surrendered the lands. It was only upon his decision that such surrender had taken place that he was authorized to certify the lands in the relocated grant. He did decide that question in accordance with the fact as set forth in the certificate, and acted thereon, approving to the State 390,000 acres, which he was not authorized to do without finding the fact and law as he did.

Acting on the same decision he certified to the State of Michigan for the canal grant over 15,000 acres of land among those so surrendered, and the Land Department sold lands within the limits of the surrendered grant to individuals, giving patents on such sales

amounting to many thousands of acres, and running through about fourteen years of time.

The action of the Secretary of the Interior in certifying these lands has never been attacked by either the State or the General Government, but has stood unchallenged for nearly a quarter of a century.

It is not open to the parties holding adversely to the Lake Superior Ship Canal, Railway and Iron Company in these cases to set up in their defense that these acts and decisions of the Governor and the Secretary of the Interior are against the interests and rights of the State, or of the United States, and therefore void.

A long line of decisions of this Court has thoroughly established the doctrine we contend for, that the error of judgment of those officers, on questions within their jurisdiction, is not subject to review by the courts, except courts of equity, *and then only at the instance of the party injured by the alleged error.*

Johnson vs. Towsley, 13 Wall., 72.

The plaintiff's certified lists have the same force and effect as a patent.

Frasher vs. O'Connor, 115 U. S., 102–115, 116.

The selection and approval of these lands for the ship canal cannot be questioned collaterally in this proceeding, or anywhere, except by bill in equity by the Government. The certified list or patent is conclusive at law.

In the case of Doe vs. Wilson, 23 How., 457, it was held that the recitals in certain patents, that the lands embraced therein lay within certain ceded limits, *which fact was necessary to the validity of the patent,* were conclusive on that point.

In the cases now under argument the certificate accompanying the lands in question sets forth that the lands described, are lands granted under the Act of Congress, "being the vacant lands designated by odd numbers, *not otherwise appropriated*," &c. Such was the decision of the Commissioner of the General Land Office and the Secretary of the Interior, deliberately made, after a careful examination of the evidence. Such decision is not to be disregarded in a collateral proceeding, where the party attacking it had no interest whatever in the subject matter of the decision at the time, and has not acquired the right of any party that was affected by the decision.

In the case of Crews vs. Burcham, 1 Black, 352, the same principle was affirmed. The point was there made that a portion of the land embraced in the patent, which was given under a treaty with a tribe of Indians, by which certain reservations selected within the lands ceded by the Indians were to be patented, did not lie within the district ceded. If the claim made was correct, as a matter of fact, there was no authority to give the patent. The Court, NELSON, J., says:

"The same objection was taken in the case of Doe vs. Wilson, and the answer given was, the recitals in the patent, that the sections were to be selected by the President, and to which the reservee was entitled under the treaty, were conclusive on the point; and we may add that certainly no third party had any right to complain if the facts were as alleged."

The case of the United States vs. Schurz, 102 U. S., 378, is decisive on this point. It was alleged in that case that the patent issued on a homestead entry was issued in violation of law, because the land was embraced in a town site and therefore was not subject to homestead entry. If the fact was as alleged

the issuance of the patent was contrary to an express provision of law. It was therefore urged that the patent was absolutely void. Mr. Justice MILLER, in delivering the opinion of the Court, says:

"To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the Public Domain. * * * The question whether any particular tract belonging to the Government was open to sale, preemption or homestead right is in every instance a *question of law as applied to the facts* for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character. * * * When their decision of such a question is finally made and recorded in the shape of the patent, how can it be said that the instrument is absolutely void for such errors as these? * * * Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously the patent may be voidable, but not absolutely void."

See, also,
French vs. Fyan, 93 U. S., 169.
Shepley vs. Cowan, 91 U. S., 330.

In the case of Steel vs. St. Louis S. & R. Co., 106 U. S., 447, the subject is again reviewed. It is there said by Mr. Justice FIELD, with regard to the Land Department:

"That Department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of the different Acts of Congress are fully complied with. Necessarily it must

consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal and is unassailable, except through direct proceedings for its annulment or limitation." Citing and quoting from

Johnson vs. Towsley, 13 Wall., 72-83.
French vs. Fyan, 93 U. S., 169-172.
Quinby vs. Conlan, 104 U. S., 420, 426.

In Smelting Co. vs. Kemp, 104 U. S., 636, the nature of the patent, as conclusive evidence of title, when collaterally assailed, is fully sustained. In the opinion in that case Mr. Justice FIELD says:

"The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the *validity of the action of the Land Department* and the *correctness of its ruling upon matters submitted to it*, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation."

It is true the Court in all these cases recognizes the exception that "if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, and the State had no title, it could be impeached collaterally in a court of law in an action of ejectment."

Patterson vs. Winn, 11 Wheat., 380.

"Void upon its face" is held by the Court, in Smelting Co. vs. Kemp, to mean, "when the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the Court must take judicial notice of."

There is certainly nothing in this case of which the Court can take judicial notice that renders the patent void. In the same case the Court further says :

"So also, according to the doctrine in the cases cited, if the patent is issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification that, when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, it is the duty of the Land Department to ascertain whether the facts exist or the acts have been performed. *Its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision.*"

Apply this principle to the present case. Concede that, by the Act of June 3, 1856, these lands were granted to the State of Michigan for a certain purpose. By the terms of the granting act the right to declare a forfeiture remained in the United States on certain conditions, and in case of the exercise of that right the land would revert to the United States.

The condition had been broken, and the right to declare an immediate forfeiture existed. Or the grant might be terminated by the voluntary act of the State Government, under authority of the Acts of Congress, without a declaration of forfeiture. The executive departments of the State and General Governments had taken such action to terminate this grant and exchange it for another, claiming that right under authority of Congress and the State Legislature. The United States, then, was not a stranger to the title, but had a substantial interest in the land. A forfeiture might, and, it is fair to suppose, would, have been declared long ago but for the certificate of surrender executed by the Governor and accepted by the Secretary of the Interior

in the form and manner prescribed by the Act of Congress for the surrender of said lands.

When the agent of the State, acting under legislative authority, selected these lands for the canal grant, it was the "duty of the Land Department to ascertain whether the facts existed or the acts had been performed" which authorized the selection and approval of these lands to apply on the canal grant. The decision was that *the facts did exist and the acts had been performed* which extinguished all the rights of the State therein and authorized the approval of the selections.

We might have rested on the presumptions raised by this action of the Interior Department without showing the act of surrender. Says the Court in the case last cited :

"Indeed, the doctrine as to the regularity and the validity of its [the Land Department] acts, when it has jurisdiction, goes so far that if, in any circumstances under existing law, a patent would be held valid, it would be presumed that such circumstances existed."

As the Act of 1856 provided for forfeiture and reversion, under certain circumstances, the mere fact that the Land Department certified these lands to the State in 1871 under the canal grant would raise the presumption that the reversion had taken place. *A fortiori* when we show the surrender, which was the evidence the Land Department had to act upon, and upon which its decision was made, it would be contrary to all the rulings of this Court on that subject to allow that decision to be attacked collaterally, especially by one not claiming under the State of Michigan, or any other party whose interests are affected by that decision.

The Executive Department of the Government is as

independent of the other departments as they are of it. Its decisions are as conclusive in any case, so far as the parties to it are concerned, as those of the Judiciary, except that in cases of fraud or clear mistake of law *the proper party* may have, by invoking the aid of a court of equity, that which he should have had but for the fraud or mistake.

There was certainly no fraud in the ruling of the Land Department that the surrender executed by the Governor extinguished all claim of the State to the lands. It was done at the instance of the State, in order that the State might get other lands for the construction of a road it wanted in the place of those which were applicable to the railroad it did not want.

We insist there was no mistake. At all events, if there was, the State got the benefit of the act, and could not repudiate it without restoring what it had received under it.

The State and the United States were both parties to the transaction, and were the only parties then having any interest, past or future, vested or contingent in the lands.

Either the State or the United States, desiring to disavow the act of the Governor and of the Land Department, or to attack the decision reached by it, must act with reasonable promptness in direct proceedings in a court of equity, giving up all that the moving party had received under it. Certainly, then, a party who had acquired no title or claim to the land, either from the State or the United States, whose claim is at most that he has a right to acquire a title by complying with conditions yet to be performed, which claim had no possible existence before March 2, 1889, eighteen years after the lands

were certified to the State, fourteen years after they were formally certified by the State to the old canal company, and more than ten years after the plaintiff had in good faith purchased the lands for a large sum of money, cannot in this action attack the plaintiff's title.

It is well settled that individuals can attack a patent in any form only by showing that it conflicts with *prior rights in them.*

Field vs. Seabury, 19 How., 332.
Boggs vs. Merced Mng. Co, 14 Cal., 362, 365, 366.

In the case of Winona and St. Peter Land Co. vs. Ebilcisor, 54 N. W. Rep., 91, the Supreme Court of Minnesota has recently held that a certification of land to the State for a railroad grant could not be attacked collaterally by one whose claim arose after the certification. The grant was made in 1857 for the Winona and St. Peter Railroad, and the map of definite location was filed in August, 1864. The land in question had been entered as a homestead in May of that same year and held under such homestead entry until 1867, when the entry was canceled by the General Land Office. The defendant entered the land as a pre-emption claim in 1871 and continued to reside thereon, although his entry was canceled by the Commissioner in 1872, for the reason that the land was considered to be within the land grant of the Winona and St. Peter Railroad. It was contended in his behalf that the certification of the land under the railroad grant was void, because at the time of the definite location of the line it was held under the homestead act. The certification of the land under the railroad act was clearly contrary to the granting act; but it was, nevertheless, held that

the certification was not void, but only voidable at the instance of the United States, and that the defendant was not in a position to attack it. Decisions of this Court are referred to, including the decision in the case of

Doolan vs. Carr, 125 U. S., 618, and
Newhall vs. Sanger, 92 U. S., 761,

and it was held that the doctrine of those cases was not in conflict with the decision there made.

The case of Kansas Pac. R. R. Co. vs. Dunmeyer, 113 U. S., 629, may be claimed to be in conflict with this decision. That was an action upon covenant of warranty, the plaintiff claiming that the defendant had no title to the land conveyed by his warranty deed. A pre-emptor had settled on the land and filed before the definite location of a line of road, and the pre-emption claim was in force at the time of the definite location, but was afterwards canceled, and it was held that the land had not passed by the grant. But the original pre-emption location had been canceled subsequent to the definite location, and had been entered as a homestead by the defendant or his grantor, which entry had been allowed by the Interior Department as valid, and actually patented to him. The decision of the Court, therefore, was in accordance with the action of the Interior Department and not against it, as it is claimed it should be in this case.

In the case of Knight vs. United Land Assn., 142 U. S., 161, it was claimed by the plaintiff below that the land in question, at the time of the conquest of California from Mexico, was below ordinary high water mark, and, therefore, vested in the State; while the defendant claimed under patent from the United States upon the confirmation of the Mexican Pueblo grant.

The patent in that case was held conclusive evidence of title.

We refer also to

Aurora Hill Con. Min. Co. vs. 85 Min. Co., 34 Fed. Rep., 515.

Noble vs. Union River Logging R. Co., 147 U. S., 165.

Parly's Parl Silver Min. Co. vs. Kerr, 130 U. S., 256.

But it is claimed that the United States had *no title* in these lands upon which the grant could operate, and, therefore, the Interior Department was without jurisdiction to act in the premises. The cases of Newhall vs. Sanger, 92 U. S., 751, and Leavenworth, &c., R. R. Co. vs. United States, *Ibid.*, 733, are relied on. In the former case the land was within the place limits of the railroad grant, and at the time of the granting act was part of a claimed Mexican grant, then *sub judice*. It had never been public land of the United States. The Act of Congress relative to such claims allowed a certain time within which they were to be presented to the tribunal established for their adjudication, and provided that all lands, the claims to which should not have been presented within that time, should "be deemed, held and considered to be a part of the public domain of the United States." Until then they were not so considered.

The doctrine of this case has been explained, defined and, perhaps, limited by the decisions of this Court in U. S. vs. McLaughlin, 127 U. S., 428, and Carr vs. Quigley, 149 U. S., 652. In the Leavenworth Railroad case the land in question was part of an Indian reservation to which the Indian title had not been extinguished. Although the United States

held the title in fee, it was a naked trust, except that the United States had the sole right to acquire the Indian title in case they should decide to part with it. But that title could only be acquired by the *consent* of the beneficiaries.

In the cases now at the bar the most that is contended for in behalf of the defendants below is, that there was a naked legal title in the State of Michigan which the United States was at liberty to terminate at any moment. But the *executive departments* of both the State and United States Governments, acting under authority of statutes *as construed and applied* by them, had done all that was requisite to the complete extinction of the State title, and to revest the lands in the United States *under the law as so construed.* It was not the case of a certification of lands, *confessedly not public lands of the United States,* as in the cases of Newhall vs. Sanger and the Leavenworth R. R. case, but lands which, after a careful investigation and consideration of the acts of the executive departments, and the law on which such acts were based, for the purpose of revesting title in the United States, were decided by the Interior Department to have been completely revested in the United States, and certified as such. In such a case this Court has never held that the certification was void.

We have examined with care every desision of this Court bearing upon the subject, and we repeat that we can find none, and therefore confidently assert that there IS NONE, *which holds a certification of the Secretary of the Interior* (such as was made in the cases at the bar) *to be void.* The consequences of such a doctrine are fearful to contemplate. No grantee of the United States would even feel or be safe.

In the case of Reynolds vs. Iron Silver Mining Co., 116 U. S., 687, the decision was not, as has been claimed, that the *patent was void*, but that the mineral lode or vein, which was the subject of the controversy *was not granted by the patent.* The patent, on the face of it, was restricted to mineral lodes or veins, *not known or claimed to exist at the date of the patent*, while the vein in question was at that date known by the parties in interest to exist.

III.

It is not open to the State of Michigan, or to the defendants in these ejectment cases, speaking for the State, to assert that the State had title to these lands at the time of their selection.

1. The Governor, as the executive of the State, is necessarily charged with the duty of construing the laws under which he is to act.

Having jurisdiction, his acts under such construction are valid until set aside by competent authority. The Congressional Joint Resolution only required the *act of the Governor* to make the surrender complete, and provided that on the *filing of his certificate* of surrender, &c., other lands should be certified to the State, in exchange for those surrendered.

The Legislature, by Act of March, 18, 1863 (above cited, *ante*, p. 35), confirmed the grant as authorized by the Congressional Joint Resolution, unto the Peninsula Railroad Company. The Congressional action was

thus accepted by the Legislature, with all its terms and conditions. By these terms *the Governor was authorized to execute the surrender*, and the United States authorities were not required to look beyond the signature of the Governor and the seal of the State for his authority to act.

Under this authority, and in accordance with the requirement of the Interior Department, as a condition of obtaining the certification of 390,000 acres of other land, and for the purpose of obtaining it, the Governor made the surrender of these lands—in all 340,000 acres. The State obtained these lands for the new line, by means of such surrender, conferred them upon the Chicago and Northwestern Railway Company, and procured the construction of the desired railroad thereby. It has never offered to restore the lands so obtained and is not in a position to do so.

This surrender, and the acquisition of the lands for the relocated grant took place more than twenty years ago. The Legislatures cannot be supposed to have been ignorant of what was done by the Executive and of what appeared in the public offices of the State, and yet the act has never been repudiated by them. Even the Act of the Legislature, approved June 7, 1881, assuming to confer the grant on the Ontonagon and Brule River Railroad Company, makes no attempt to undo what was done by the Governor eleven years before, but merely confirms the action of the Board of Control in conferring on that company "All and every the right, title and interest which now remains in said State of Michigan to the said lands, be the same more or less" (Rec., p. 140).

Even this action was *eleven years* after the last sur-

render of the Governor, ten years after the selection and approval of the lands for the canal grant and *four years* after the *purchase of the lands*, in good faith, by the Lake Superior Ship Canal, Railway and Iron Company.

2. The State accepted the canal grant with all the terms and conditions contained in the granting act. One of these terms was that the lands should be selected by an agent appointed by the Governor. Such agent was appointed, and his act in selecting the lands was the act of the State, and sanctioned by legislative authority. As the act of the State, he selected portions of the abandoned and reconveyed land grant, treating them as United States public lands. His action, when approved by the Interior Department of the United States, and after the canal grant was adjusted in accordance with it, bound the State, and the State having received the full and stipulated consideration for the lands—to wit, the construction and completion of the canal—could not be heard to say that the lands belonged to the State for other purposes.

This State agent, when he first made these selections, was informed that they could not be approved until a formal release from the railroad company and the State authorities was had. The Commissioner furnished him a form of release such as would be required. The release called for, that of August 14, 1870, covering the lands now in suit, was furnished, and the approval of the selections followed.

The State, acting by its Governor, nearly four years after having selected these lands as applicable to the canal grant, executed the final certificate, author-

ised by Act of the Legislature, to vest the title of the lands in the old canal company, and intended for that purpose alone. No complaint of that action was made by *any department of the State Government*, and seven years after the selection and approval of the lands under the canal grant, and three years after the final act of the Governor vesting the title in the old canal company, the present company, the plaintiff below, became the purchaser of the lands in good faith, relying on these acts of the State.

3. Since the purchase by the present company the State of Michigan has annually levied taxes on the lands, and received payment of the same from the plaintiff, amounting, to and including the year 1888, to more than $18,000. And it may not be out of the way to add, what is a fact, that such levy and collection of taxes has continued annually ever since.

See Clark vs. Strickland, 2 Curtis C. C. R., 439.

The State, if a party to these suits, would be estopped to set up title against its acts in selecting these lands and passing title to the canal company; and the defendants below, even if claiming under the State, would be affected by the same estoppel (Pengra vs. Munz, 29 Fed. Rep., 836).

And they certainly could not complain of the illegality of these acts on behalf of the United Suates.

On the subject of estoppel against the State, we refer to the following cases:

Chandler vs. Calumet & Hecla, 36 Fed. Rep., 665; affirmed by this Court, 149 U. S., 79.

Pengra vs. Munz, 29 Fed. Rep., 830.

Hough vs. Buchanan, 27 Fed. Rep., 328.
Cahn vs. Barnes, 5 Fed. Rep., 327.
State Comr. vs. Heirs of Andre, 3 Pick., 224.
Carver vs. Astor, 4 Peters, 87.
Commonwealth vs. Pejepscut Proprietors, 10 Mass., 155.
Atty.-General vs. Ruggles, 59 Mich., 124.
State vs. Railroad Co., 89 Mich., 481.
State vs. Milk, 11 Fed. Rep., 389.

It has been claimed that the lands were granted to the State for railroad purposes only, and that it had no authority to dispose of them for any other purpose. But, as we have shown, there was no one interested in the execution of the trust other than the State of Michigan and the United States.

In Baker vs. Gee, 1 Wall., 333, lands which had been granted to the State of Missouri for railroad purposes and *no other*, were opened by the State to preemption. The grant was conferred by the State upon a railroad company, and a purchaser from the company brought ejectment against a party who had taken a preemption on the land, claiming that the State had no power to dispose of them in that way. This Court held that no one but the United States could raise that question.

In Cahn vs. Barnes, *supra*, the plaintiff claimed under a grant made by the United States to the State of Oregon in 1866 for the construction of a wagon road. The Act of Congress provided that when the Governor should certify to the completion of the road, patents should issue to the State, or its assigns, as fast as the lands should be selected and certified. The grant was by the State Legislature in 1866 conferred upon a corporation which constructed the road. The land in

question was certified to the State in 1871, "subject to any valid, interfering rights which may have existed at the date of selection of said lands." And in 1876 a patent was issued to the State for the lands under said grant "for the use and benefit of said corporation as its assignee," and transmitted to the Governor, who received it and caused it to be recorded. The defendant claimed under a contract of sale from the State of the same land, as having vested in the State in 1860 under the Swamp Land Grant.

There was no legislation granting this piece of land to the company that built the road, nor was there any legislative authority for the Governor to convey swamp land to apply on the Wagon Road Grant. Mr. Justice DEADY in deciding the case says:

"It appears to me that the State is estopped to say, as against its grantee, this plaintiff, that this is not wagon road land. The State granted this land to plaintiff's vendor as wagon road land, and allowed it to be selected and approved as such by the Secretary of the Interior without objection long before it was sold to the defendant as swamp land."

In the case of Pengra vs. Munz, *supra*, opinion by the same Judge, there was a similar contest, and the following language is used:

"This land was formally selected and certified to the State as wagon road land with its acquiescence, if not active concurrence, and it is now estopped as against the plaintiff to deny that the premises are included in such grant, or to assert that it acquired them under the swamp land grant."

"Active concurrence" of the State, if there was any, was the act of the Governor in connection with the selection and certification of the lands under the wagon road grant.

The case of Hough vs. Buchanan, *supra*, arose in Iowa. Plaintiff claimed as purchaser under a railroad grant from the United States in 1856, and the defendant under the swamp land grant of 1850. The land in question had been selected by an agent of the State as indemnity land under the railroad grant, and the selection approved by the Secretary of the Interior, "subject to any valid interfering rights." The Court, SHIRAS, J., says :

"The railroad company was a purchaser for value, in that it had agreed, in consideration of receiving the quantity of lands specified in the Act of 1856 to construct the line of railway from Dubuque to Sioux City. After procuring the conveyance of these lands to the railroad company it would be most unjust to permit the State to assert a right to the same lands under the swamp land act. The certificate executed by the Commissioner, and approved by the Secretary of the Interior, provides that the lands are certified subject to any valid interfering rights ; but that restriction cannot be held to be a reservation in favor of the State of Iowa, under the facts of this case. * * * The duty of making the selection of the indemnity lands is left with the State, and the agent appointed by the Governor selects the lands in question, and the same are certified to the railroad company."

"If, under these circumstances, it should now be held that the State is not debarred from asserting a claim to these lands under the swamp land act it is clear that a fraud would thereby be perpetrated upon the company and its grantees."

In State vs. Milk, *supra*, it is said :

"Resolute good faith should characterize the conduct of States in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel."

In the case of Commonwealth vs. Heirs of Andre reason for applying the doctrine of estoppel to States, in addition to those which apply to estoppel as against

individuals, is found in the fact that the State is not liable to an action.

The case of the State vs. R. R. Co., *supra*, is a Micihgan case, and the doctrine we contend for is clearly and strongly applied by the Supreme Court of that State. Upon that ground alone the bill of the State, claiming title to a large quantity of lands under the Swamp Land Act as against a railroad company, on whom it had conferred the same lands, certified to it as a land grant, was dismissed. This, then, is the law of Michigan as applied by the Supreme Court of that State, and established as a rule of property in that State.

IV.

It would not be open to the United States, if a party to these suits, to claim the title to these lands as against the Lake Superior Ship Canal, Railway and Iron Company.

The lands were certified to the State under the canal grant, which certification had the force of a patent.

Revised Stat., Sec. 2449.
Frasher vs. O'Connor, 115 U. S., 102.

The duty of passing on the selections made by the State for the canal grant was imposed by the law on the Secretary of the Interior. It was for him to decide what lands were applicable to the grant. He did so decide, and made his certificate, which purported to

pass the title to the State. He had first notified the agent of the State, as well as the old canal company, what was necessary to be done in order authorize the selection of these lands, and the acts required were done. Here was a direct representation by the officer of the United States charged with the management of the public lands, and the only one to whom the agent of the State could apply, in order to ascertain what lands were applicable to the grant, that the lands were lands of the United States and could be selected under the grant. The conveyance was made and the consideration was received by the United States. The legal title had been in the State, but according to the decision of the Secretary of the Interior after careful examination, it had become revested in the United States.

The agent of the State, and the canal company relied upon these declarations and decisions of the Interior Department, and had a right to do so. After those acts of the Interior Department had stood unchallenged by any department of the United States Government for six years, the Lake Superior Ship Canal, Railway and Iron Company bought these lands in good faith, and has ever since held them, paying taxes thereon, as we have before shown. This action of the Interior Department was a matter of public record, and never was disavowed by any act or proceeding of Congress, while, in the mean time, millions of dollars were spent in reliance upon the correctness of such action.

Not only were these acts unchallenged by Congress; but, after these identical lands had been approved to the State for the canal grant, and such approval was a matter of public record, Congress extended the time

for the completion of the canal—March 27, 1872, and, again, March 3, 1873.

We submit that the United States, under the circumstances and facts appearing in these cases, could not successfully assert title to these lands, and, therefore, the defendants cannot be heard to set up against the plaintiff that the title is in the United States.

In the case of U. S. vs. McLaughlin, 30 Fed. Rep., 159–162, Justice SAWYER (SABIN, J., concurring) says:

"The interests of all these pre-emptioners and purchasers from the Government, as well as the parties taking under the railroad grants, and the interests of public justice generally, require that this practical location of the vague, uncertain, impracticable eastern-exterior boundary of the Moquelamos Grant of 1855, acted on by all Departments of the Government, by the public and even by the claimant himself, for nearly a quarter of a century, should not be disturbed; that the Government should now be estopped from alleging that it is, or should be, located elsewhere."

V.

The uniform, long continued, practical construction of the Congressional Joint Resolution of 1862, and of the Joint Resolution of the Michigan Legislature authorizing the Governor to make the certificate of surrender, and the other legislation connected with that railroad scheme, after extensive property rights have been acquired and transferred under such construction, should now be conclusive on all departments of the Government.

The case of U. S. vs. B. & M. R. R. Co., 98 U. S., 334, was a suit in equity to set aside patents issued under what was claimed, in behalf of the Government, to have been an erroneous construction of the Granting Act. Mr. Justice FIELD, delivering the opinion of the Court, reviews the construction of the act, on which the departments of the Government had acted, and said :

" Such has been the uniform construction given to the acts by all departments of the Government. Patents have been issued, bonds given, mortgages executed and legislation had upon this construction. This uniform action is as potential as if it had been declared by judicial decision. It cannot at this date be called in question."

This decision was made by this Court in March, 1879, concerning the construction of a statute of 1862. The "uniform action" on that statute, which was held to be controlling, was shorter by several years than that on the statutes involved in this case.

In Brittan vs. Ferry, 14 Mich., 67, Mr. Justice COOLEY, in referring to the long-continued, practical construction of a decision of the Land Department, says :

" But it is a consideration which, at this period of time, cannot be overlooked, that the proper department has put a construction upon this statute which will forbid adopting the argument, unless we are prepared to disregard a settled practice of sixty years and accept a rule which, by taking from the quarter posts their authority, opens the flood gates to the very evil which Mr. Gallatin supposed the Act of 1805 had provided against."

He then quotes the instructions that had been given by the Commissioner of the Land Office in regard to the survey, and continues :

"It is true that this construction had not the force of law, but as it was adopted immediately after the passage of the act and has been adhered to ever since, the reasons for now repudiating it should be both cogent and conclusive before we are warranted in accepting them."

In Washington vs. Page, 4 Cal., 388, the question was whether a constitutional requirement that an enactment of the Legislature should have but one object which should be expressed in its title, was directory or mandatory. Contrary to the rule acted on in most States, it was held to be merely directory, and the Court says :

"If we were inclined to a different opinion, we should be careful how we lent ourselves to a construction which must, in effect, obliterate almost every law from the statute books, unhinge the business and destroy the labor of the last three years."

In the case of Stuart vs. Laird, 1 Cranch, 299, the question was raised whether a Justice of the Supreme Court could lawfully sit as Circuit Judge, not having been appointed as such, and the Court, in deciding the question, said :

"To this objection, which is of recent date, it is sufficient to observe that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. This practical exposition is too strong and obstinate to be shaken or curtailed. Of course, the question is at rest, and ought not to be disturbed."

In the case of Ogden vs. Saunders, 12 Wheat., 290, the Court, in applying this principle to the construction of the Constitution by Mr. Justice JOHNSON, says :

"Every candid mind will admit that this is a very different thing from contending that the frequent rep-

etition of a wrong will create a right. It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people when it was adopted by them."

In the case of Rogers vs. Goodwin, 2 Mass., 477, upon the construction of a statute, the Court says:

"**Of these statutes a practical construction early and generally obtained that in the power to dispose of lands was included a power to sell and convey the common lands. Large and valuable estates are held in various parts of the commonwealth, the titles to which depend on this construction. Were the Court now to decide that this construction is not to be supported, very great mischief would follow.** And although, if it were now *res integra*, it might be very difficult to maintain such a construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction, which must prevail over the mere technical import of the words."

In the case of Essex Co. vs. Pacific Mills, 14 Allen, 389, the Supreme Court of Massachusetts held that where treasury notes had constituted the currency of the country for five years, and the pecuniary transactions of the whole people had been adapted to that state of things, the question of the constitutionality of the the Act of Congress making them legal tender could not be considered an open question.

We refer also to the following cases:

Royce vs. Goodwin, 22 Mich., 500, 501.
Union Ins. Co. vs. Hoge, 21 How., 66.
Edwards' Lessees vs. Darby, 12 Wheat., 210.
State vs. Mayhew, 2 Gill., 487.
Bingham vs. Miller, 17 Ohio, 445.

If there was any error in the construction of these legislative acts, the error was participated in by the executive departments of the State and the United States, and in fact by the legislative departments of both governments, either in actual legislation or in refraining from legislative interference; by the solicitor and officers of the railroad company interested in the grant; by the original canal company; by numerous parties who invested large sums of money in the bonds of the old canal company, and in the certificates of indebtedness under and in accordance with the decree of the United States Circuit Court; by the present company in purchasing the lands; and by the public at large in purchasing and dealing in the lands so granted to the canal company, and in purchasing lands of the Government similarly situated.

No stronger case could be imagined for the application of the maxim "*communis error facit jus.*"

Shep. Touch., 40.
McCann vs. Delancy's Lessee, 5 Cranch, 22–32.
Same case, 1 Wash. C. C., 529.
Manchester vs. Huff, 5 Mason (U. S.) C. C., 67–69.
McFerran vs. Powers, 1 S. & R., 105.
U. S. vs. Ship Recorder, 1 Blatchf., C. C., 223.
U. S. vs. Union Pacific, 37 Fed. Rep., 551, 555.

Same case, 148 U. S., 562.
U. S. vs. M. K. & N. Ry., 37 Fed. Rep., 68.
Knight vs. United Land Assn., 142 U. S., 161.

In this last case Mr. Justice LAMAR says:

"Even if there were any doubt of the existence of such power in the Secretary of the Interior as an original proposition, still the exercise of it for so long a period, going back to the organization of that department, without question, ought to be considered conclusive as to the existence of that power," citing Hastings, &c., R. R., Co., vs. Whitney, 132 U. S. 357.

We ask particular attention to the remarks and citations of Justice BREWER, then Circuit Judge, in the case of United States vs. Union Pacific Ry., 37 Fed. Rep., pp. 555 and 556. We would much like to quote his language, but would require too much space to do so at large, and so we content ourselves with asking attention to it. It is very strong and emphatic on this subject.

Applied to the facts of this case, this doctrine should be absolutely controlling. The whole scheme of railroads in Wisconsin, and the two branches in Michigan, had been undertaken by one company and was known as the Chicago, St. Paul and Fond du Lac Railroad.

That company became insolvent, and its franchises were acquired by the Chicago and Northwestern Railway Company. This company, by the consent of Congress and the Legislature of Michigan, abandoned the whole system and adopted in its place a different one, by which they would reach Marquette via the mouth of the Menominee River, where they would connect with the contemplated land grant railroad from Marquette to Ontonagon.

The legislation of the United States and the State of Michigan was understood and construed as an abandonment of the whole system by the State and the United States, and the adoption of the new scheme in its stead. This construction was placed upon these Acts of Congress and the State Legislature, contemporaneously with their enactment, by officers whose duty it was to construe them and act thereon, and who must be supposed to have been acquainted with the condition of things at the time, with the defects that were designed to be remedied by the legislation, and the remedy that was sought to be adopted, and were better qualified to construe such legislation than those who in later years have assumed to criticise their action. In the language of this Court in Ogden vs. Saunders, "they had the best opportunities of informing themselves of the understanding" of the framers of that legislation, "and of the sense put upon it by the people when it was adopted by them."

The new line would require some 50,000 acres more of land than was granted for both the Marquette and Ontonagon branches, as they were called, and as the Joint Resolution of 1862 did not authorize the Secretary of the Interior to certify any more land for the new than was surrendered by the State from the old, the Land Department required the surrender of the land on both "abandoned branches" before the selections for the Chicago and Northwestern Railway Company could be approved. This was in accordance with the understanding of the Department of the intention of Congress in passing that Joint Resolution. As the State wanted the land, so that the construction of the new line of railroad might proceed, the Governor, after carefully considering the matter, and taking the advice

of the Attorney-General, decided that the requirement of the Joint Resolution of Congress, and the authority conferred by the legislation and Joint Resolution of the Michigan Legislature, were as claimed by the United States Land Department, and acted accordingly. Thereupon the Land Department, acting on the same construction, certified to the State the lands selected for the new line, in the place of those surrendered, which lands were accepted by the State, certified lists were deposited in the State Land Office, and the lands were patented to the Chicago and Northwestern Railway Company by the State. The railway company has held these lands many years, and many, perhaps most of them, have been sold to purchasers.

Acting on the same construction, the agent of the State selected the lands involved in these three suits, and about 15,000 acres more similarly situated, as applicable to the canal grant under the Act of July 3, 1866. Following the same construction, the Commissioner of the General Land Office and the Secretary of the Interior in 1871 certified and approved the selections under the canal grant, and the approved lists were transmitted to the Governor and by him deposited in the State Land Office (Rec., p. 44).

Some time after, Governor BAGLEY—July 10, 1873—in a letter to the Secretary of the Interior, set up the claim that the land covered by the release of Governor BALDWIN was erroneously released and still belonged to the State. It will be noticed, however, that even he made no claim that Governor CRAPO, in the surrender made by him May 1, 1868, which covered all the lands in the limits common to the Ontonagon and Marquette lines (see Rec., p. 155) exceeded his authority. Two years later, however, June 25, 1875, following the

same construction that had been placed on these acts, he executed the final certificate of the completion of the canal *(ante,* p. *14)*, which was designed to operate as a patent, to the old canal company, of all the lands so certified to the State. During this time he had evidently acquainted himself with the construction that had been placed on these acts, both by his predecessor and by the United States Land Department, and we do not find him after this time questioning its correctness. From that time to 1879 the Land Department continued disposing of lands within these limits, both odd and even sections, as public lands of the United States, without interruption, as we have before shown.

The selection of one parcel of land for this canal grant, the northeast quarter of the southwest quarter of section fifteen (15), in township forty-five (45) north, of range thirty-five (35) west, had been inadvertently canceled, and the Commissioner of the General Land Office, by letter of August 1, 1880, notified the Register and Receiver that the cancellation was withdrawn. This was within the clear limits of this Ontonagon line (Rec., p. 171).

July 16, 1880, the same Commissioner notified the Register and Receiver that certain entries made in section five (5), township forty-two (42) north, of range thirty-five (35) west, within the common limits, were suspended, for the reason that the amount paid therefor was not sufficient, and directed the Register and Receiver to call for the payment of the deficiency and issue a supplemental receipt therefor, and transmit the same to the General Land Office with their regular returns (Rec., p. 170).

September 29, 1887. a conflict arose between a

party desiring to enter certain lands in section eleven (11), township forty-two (42) north, of range thirty-five (35) west, for cash, and certain other parties claiming the same as pre-emption entries, and came before the Commissioner of the General Land Office. He held that the lands were not subject to private entry, but that they were subject to pre-emption entry. They were within the common six-miles limits of the Ontonagon and Marquette branches (Rec., pp. 174 to 177). As to the surrender by the State to the United States, the Commissioner says:

"As to the lands in such common limits, the joint resolution providing for the surrender of lands in the limits of the M. & S. L. R. R., was sufficient authority for their surrender; and this, coupled with the fact that they were relinquished under said act, and that thereunder other lands have been selected and certified in lieu of those relinquished, is conclusive as to the rights of the State, which, by such relinquishment, waived all rights it might have in said lands, and the Department so treated—as to the even sections in the Pecard vs. Camens case, referred to, by applying the provisions of the 4th section of the joint resolution (relative to the even sections) to the even sections within the common limits" (Rec., p. 176).

The Secretary of the Interior, on appeal, in the same case, affirming the action of the Commissioner in rejecting the application of all cash entries, at the close of the opinion says:

"The applications of Cutter, Frank and Layden (the pre-emption claimants) will be disposed of as directed by your decision September 29, 1887, which is affirmed" (6 Public Land Dec., pp. 451, 45).

September 11, 1888, the Commissioner of the General Land Office rejected the applications of about one hundred pre-emption claimants, among whom was Walter A. Cunningham, for the reason that the lands

had been previously approved for the Portage Lake and Lake Superior Ship Canal (Rec., p. 172). This action was affirmed by the Secretary of the Interior March 7, 1890 (Rec., pp. 171, 172).

Notice the action on March 19, 1888, on 155 cases next referred to, running through six years, and holding that the lands on the Ontonangon branch to be public lands, and subject to entry as such.

March 19, 1888, the Commissioner of the General Land Office ordered the allowance of a large number of homestead and pre-emption claims, one hundred fifty-five in all, upon odd-numbered sections within the limits of the Ontonagon branch, which had been made running through the years 1882 to 1888, deciding that the lands were open to entry under the homestead and pre-emption acts and should be allowed as of the dates of the respective applications (Rec., pp. 169, 170).

All these decisions and acts of the Interior Department recognized these lands as public lands of the United States. As such they were subject to be selected under the Canal Grant of 1866. The decisions of the Interior Department, without exception, up to the present time have been that the approval of these lands to the State under the Canal Grant constituted an appropriation of the lands, and took them out of the jurisdiction of the Land Department; but if the selection and approval of the lands under the Canal Grant was absolutely void it could not have that effect, and the decision of the Interior Department in rejecting the applications of pre-emption and homestead claimants for such canal lands was erroneous.

The construction, then, placed by the Interior Department upon the series of acts which we claim as revesting the lands in the United States has been

adhered to by that Department from the first down to the present time. The present company, as before shown, in good faith bought the lands in May, 1877, relying upon this construction of the law, and has been paying taxes on them ever since, amounting to many thousands of dollars, and has been dealing with the lands as owner ever since.

In addition to this, thousands of acres of land within this grant have been sold to individuals, re-sales have been made, and large amounts of money have been invested, relying upon these acts of the State and the United States. It is impossible to estimate the injury that would be inflicted, the immense property interests and titles to real estate that would be unsettled and overturned by a decision of the Courts now made that all this executive action has been erroneous to such an extent that their acts have been absolutely void.

Not only would the plaintiff lose all the money it has paid in good faith for said lands, and for taxes thereon, but those to whom it was sold would lose their titles, titles on individual entries would be overturned, owners of mines, mills and village and city property, largely improved by buildings, &c., would be upset, and the accumulations of hundreds of men, in good faith invested in reliance upon the action of the executive departments of the State and the United States, would be swept away.

Such a ruling must necessarily result in the conclusion that a large part of the certification of lands to the State and the Chicago and Northwestern Railway Company was illegal, and would be set aside on proceedings instituted by the United States at least, if they are not absolutely void. Such a result ought

to be avoided if it is possible to give the laws such a construction as to avoid it.

Can it be said that a construction that was given to the law by the large number of officials whose acts we have been considering, men of unquestioned ability and integrity, and on which they have acted for so many years, is an impossible construction? The Court may differ in opinion with those officers, but to say that their rulings were so manifestly wrong as to justify overturning all that has been done under them for more than twenty years is, we think, an assumption that this Court will not make.

The equities, as every one must admit, are all with the plaintiff, and the defendants are entirely without equities. They entered upon the lands well knowing the claim and rights of the plaintiff, with their eyes open, and with the purpose of contesting the plaintiff's rights.

An attempt by an individual to avoid the acts of his agents, acted upon by him, and by all parties interested, and acquiesced in by him for so long a time, retaining all the benefits of the series of transactions, would be an act so exceedingly dishonest as to bring down upon the individual the contempt of all honest men. Can it be said that like conduct would be any less disreputable on the part of the Government? The Government has never yet attempted it, but the defendants in these cases attempt to maintain that the Government is bound in their behalf to repudiate these acts. Will it be said by this Court that the laws of the United States are so technical and of such a nature as to prohibit the Government from dealing honestly with its citizens?

We invite especial attention to the language of Judge SEVERENS, whose opinion on the motion for a

new trial in these cases is found on page 35 of the record.

"The obligations of legal morality rest certainly with as much weight upon the State as upon private individuals. * * * It was justly said in Woodruff vs. Trapnall, 10 How., 190, 207, by the Court in delivering judgment that we naturally look to the action of a sovereign State to be characterized by a more scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals. * * * In dealing with these it does not seem to me that a State can be regarded as merely a mechanical organization, and its action in such matters be treated as unaffected by obligations which elsewhere bind the conscience."

And, again, on page 36 of the record:

"It seems to me that courts should not measure the action of great organizations, like the State and the General Government, by the square and compass of technical law, which, though well fitted to the measure and determination of private conduct and controversies, might work confusion if applied to great public transactions occurring in the past, and in reliance upon the validity of which many private rights have been founded."

And, again, on page 37:

"Instances abound in the law where a matter of doubtful coherence becomes solid under the pressure of supervening events, and cases often arise where the maxim *quod fieri non debet factum valet* applies, and I think this is such a one, even if it be conceded that the action of the Governor and the Land Department was based upon a mistaken construction of the acts of Congress."

We call attention also to the opinion of Judge SEVERENS, concurred in by Judge SAGE, delivered on the first trial of these causes, which is appended to this brief.

We also append an opinion of Justice GRANT, now of

the Supreme Court of Michigan, in a case tried before him at the circuit, involving the title to a parcel of land situated similarly to those involved in these cases.

VI.

The title of the Lake Superior Ship Canal, Railway and Iron Company was confirmed, if not already perfect, by Section 3 of the Act of Congress, approved March 2, 1889, 25 Statutes at Large, page 1008. [Reprinted in full in the Appendix to this Brief.]

By Section 1 it was enacted :

" That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to the State of Michigan, by virtue of an act entitled, ' An Act making a grant of alternate sections of the public lands in the State of Michigan to aid in the construction of certain railroads in said State, and for other purposes,' which took effect June 3, 1856, which are opposite to and coterminus with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain."

There were at that time remaining in force in the Upper Peninsula of Michigan the following grants of land for railroads, under the Act of June 3, 1856, to wit :

(1) The grant for the railroad from Bay de Noquet to Marquette ;

(2) The grant for the railroad from Marquette to Ontonagon ;

(3) And, if the surrender by the Governor of Michigan in 1870 was ineffectual, the grant for the railroad from Ontonagon to the Wisconsin State line.

The act of March 2, 1889, does not particularize any of these grants. It is not assumed by this act that the grant for the railroad from Ontonagon to the State line remained in force, but merely applies generally to all land grants in the State of Michigan, granted to the State by said act, lying opposite to and coterminus with the uncompleted portions of the railroads to aid in the construction of which said lands were granted.

The third section provides that:

"In all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections of Michigan confirmed by the Secretary of the Interior, under color of the public land laws, where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals, shall be, and hereby is, confirmed: Provided, however, that where the original cash purchasers are the present owners, this act shall be operative to confirm the title only of such cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud, and in the belief that they were thereby obtaining valid title from the United States ; that nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were *bona fide* pre-emption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land, under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed."

The confirmation in this section applies to two classes of lands: First, those forfeited by the first section of said act; second, lands relinquished to, or for any cause resumed by, the United States, from grants for railroad purposes, heretofore made to the State of Michigan.

If the grant for the Ontonagon and State Line road had not already been lawfully surrendered to the United States before the passage of this act, it was by this act declared forfeited, and State selections made therein, under color of the public land laws before the forfeiture, were confirmed.

If these lands had been lawfully surrendered, or, in the words of the act, "relinquished to and resumed by the United States," still, if there was any defect or irregularity in their selection, the selections were confirmed by this act.

Three Judges (JACKSON, BROWN and SEVERENS, J. J.,) sat upon the motion for a new trial in the Cunningham case (Record, pp. 12–37) The effect of the Confirmatory Provisisions of the Act of March 2, 1889, were not passed upon, but expressly left open to be determined on the new trial. Referring to the act, Circuit-Judge JACKSON, in his opinion, said:

"By the Act of March 2, 1889, Congress declared certain lands granted to the State af Michigan for railroad purposes by the Act of 1856 forfeited. This act confirmed certain rights, titles and entries, but need not be specially noticed, as it is a matter of construction and grave debate whether its confirmatory provisions are most in favor af plaintiff or defendant. Both sides claim the benefit of its provisions. The act was not, however, passed upon by the trial Judge, who directed a verdict for the plaintiff on other grounds (Record, p. 14). * * *

"It results, in the judgment of this Court, that there should be a new trial in this case, at which the plaintiff

will have to claim a confirmation of its title to the exclusion of defendant's right from the Act of March 2, 1889, the construction and legal effect of which is not now passed upon " (Record, 26).

At the first trial of the Cunnigham case, before SEVERENS and SAGE, JJ., nothing was said about the Act of March 2, 1889, as the plaintiff's title was adjudged good aside from said confirmatory act. [See opinion of these Judges, given on this trial, reprinted in the Appendix to this brief, *post* pp. 155-160.] On the said motion for a new trial, SEVERENS, J., gave no opinion on this point. On the second trial SEVERENS, J., was of opinion that Sec. 3 confirmed the canal selections, but SAGE, J., thought otherwise, and SEVERENS, with doubt and hesitation, concurred in Judge SAGE'S view (Record, pp., 186–188).

Afterwards, when the precise point was fully argued and the history of the act of March 2, 1889, developed, both SEVERENS and SAGE, JJ., reach the conclusion that the Act of March 2, 1889, was intended to, and did, confirm the canal selections (see Opinions of SEVERENS and SAGE in Appendix to Brief, *post*, pp. 167-172).

On the said first motion for a new trial of the CUNNINGHAM case, heard, as above stated, before JACKSON, BROWN and SEVERENS, JJ., &c.

Mr. Justice BROWN says:

" I do not think that the act of forfeiture of 1889 enured to the benefit of the canal company. That act was a complete forfeiture of the right of the State to hold the lands for any purpose. It cut off all right which the State then had to these lands, but it conferred no title upon the canal company, and left this company standing in the position of a naked trespasser. The Act of 1866 did not confer these lands upon the State, because the grant was limited to lands then belonging to the United States, and the State never re-

ceived a subsequent title to these lands which would inure, by way of estoppel, in favor of the canal company. In the case of the Leavenworth, &c., Railroad Co., 92 U. S., 733, it is said of a land grant act similar in its terms to the Act of 1866, that the State takes an immediate interest in the land whereto the complete title is in United States at the date of the act. But if they are at that time reserved for any purpose whatever they are excluded from the operation of the act, and it is immaterial whether they subsequently become a part of the public lands of the country. A subsequent sale and grant of the same lands to another person is absolutely null and void so long as the first appropriation continues in force" (Record, pp. 29, 30).

That is to say, first, the original selection was absolutely void; second, that which is not merely voidable but absolutely void is not made valid by an act of confirmation; third, therefore, the act confers on the canal company no title.

To this we answer:

FIRST. Congress had ample power to absolutely grant *de novo* to the canal company any and all of the lands which the provision above cited first forfeits and resumes. The confirmation of a void selection can be no more than this. It is therefore within the power of Congress to confirm even a void selection, putting the grant in this shape for convenient designation of the lands to be affected. That is obviously what is done here. The reference to lands relinquished by the State of Michigan, and afterwards disposed of under State selections conclusively imports full knowledge of the situation of specific lands, and declares the purpose to confirm the ownership of them upon the party holding under the selections.

SECOND. From another standpoint this purpose is equally clear. A peremptory feature of the designated lands is that they must be lands the consideration for

which had been received by the Government, and is still retained by it. The reference here is to that clause in the Canal-granting Act of March 3, 1865, which provides that the said canal shall be and remain "a public highway for the use of the Government of the United States, free from toll or charge upon the vessels employed by said Government in the transportation of any property or troops of the United States." Confirmation of selections of land, for which the Government has received and retains the consideration, can mean nothing less than the payment in those lands for consideration received, and it is difficult to see how an act of that character can be declared inoperative, upon the mere ground that the selections previously made conferred no title at all. The selections were at least a determination of lands which the party from whom the consideration moved would be willing to receive. If then the party upon whom the obligation rests to pay in lands, confirms that designation, and has, at the time, full power of disposition, how shall that act, complete in form, be held to be inoperative?

Suppose the canal company was refusing to take these lands, having found others preferable open to selection, and were claiming those, what answer could it make to the suggestion that it had already selected these; and, although its selection was originally invalid, it had held on to the lands, continuing to claim them, until its selections were confirmed by competent authority? To hold that no title accrues to the canal company by the provision above cited is to judicially affirm that Congress, confessing itself to have received the consideration for certain lands, which it designated as "disposed of under State selections," and expressly confirming those selections, meant to restrict its con-

firmation to only such selections as it was competent for the State to make. The act, however, expressly confirms selections previously made from "lands forfeited by the first section of this act," *i. e.*, lands granted to Michigan by the Act of June 3, 1856. Hence, such a judicial affirmation as was above supposed would be, not only without basis in the language of the act, but would directly contradict it.

That this consideration exists, and is a valuable consideration "still retained by the Government," further appears in the discussion by the Supreme Court of Michigan, in the case of Attorney-Gen. vs. Lake Superior Ship Canal Co., 32 Mich., 233.

A void grant may be confimed by statute. Such confirmation relates back, and is equivalent to previous authority.

Seabury vs. Field, 1 McAllister, U. S. C. C. Cal., 1.
Durand vs. Martin, 120 U. S., 366, 371.

If it be true, then, that the title to these lands remained in the State, under the Act of 1856, until the passage of this Act of 1889, they were

FIRST. Lands forfeited by the first section of said act.

SECOND. They had been heretofore disposed of by the proper officers of the United States, under State selections in Michigan, confirmed by the Secretary of the Interior, under color of the public land laws.

THIRD. The consideration received therefor was still retained by the Government.

Unquestionably, then, the selection of said lands,

and the title thereto, were confirmed, unless they came within some of the exceptions specified in the act.

The only exception was in the case of lands "upon which there were *bona fide* pre-emption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of the land, under color of the laws of the United States."

There were no bona fide pre-emption or homestead claims in favor of the defendants upon any of the lands involved in these three suits on the first of May, 1888.

It is clear from the language of the act that the burden is upon those asserting the existence of such claims to prove them.

In the HUGH FINAN case (case No. 306) there is no pretense that any such claim existed May 1, 1888. His pre-emption application was offered November 23, 1888, and he alleges a settlement on November 1, 1888 (Rec., p. 146). He testifies that he went into possession of the property on the 12th, 13th or 14th of May, 1888 (Rec., p. 145).

In the case of WALTER A. CUNNINGHAM (case No. 305) it is insisted that his claim existed on and before May 1 1888; but his declaratory statement was dated May 25, 1888, and he alleges a settlement on the same date (Rec., pp. 141, 142). It is true that he adds a postscript, saying that he has lived with his family on the land since the 28th day of March last; but his settlement, which was the inception of the pre-emption claim, is alleged in the declaration which he offered, and we insist that he is bound by it. By that declaratory statement he gives formal notice to the world of the time he claims his rights to have originated.

In the MICHAEL DONAHOE case (case No. 307), the declaratory statement was offered April 11, 1883, and he claims to have lived on the land ever since (Donahoe Record, p. 15).

The only defendants in these three suits who can by any possibility claim to have had pre-emption claims upon the lands May 1, 1888, are Cunningham and Donahoe.

As to Cunningham, we have shown the date of his application and alleged settlement. The declaratory statement is required to state the date of settlement. That statement is material and, as we have said, the pre-emptor is bound by it. The declaratory statement must be filed within thirty days after the alleged settlement. The only date of settlement alleged in the declaratory statement, or in the postscript, within thirty days of the offer to file, is the 25th of May, 1888.

Neither Cunningham nor Donahoe had a pre-emption claim on May 1, 1888, "under color of the laws of the United States."

They entered into possession and occupied the land under the claim that it was State land and not land of the United States.

Under their own contention the land was not subject to pre-emption, and clearly, therefore, they could not have claims under the laws of the United States, or under color of those laws.

Cunningham says of this land in his testimony:

"I was told that it was a railroad grant. * * * I read of these railroad grants in the papers and talked with various parties about it. * * * When I came up there to take the land I understood that this land was embraced in the grant to the State for the benefit of some railroad company, and so understood when I went onto the land. I expected that

some time in the future the grant would be removed and I could get the land. I did not understand that it was United States land at the time that I went onto it" (Rec., pp. 144 and 145).

Donahoe testifies, in regard to the land he settled upon:

"I also heard that it was a grant to the Brule River and Ontonagon Railroad, and that there was to be an act of Congress forfeiting the grant. Everybody thought it was going to revert back to the Government, so I thought I would have a chance to make a home of it. I didn't understand that the grant had already been forfeited, but that it probably would be forfeited and that if I settled on it I would have a chance to get it" (Donahoe Rec., pp. 14 and 15).

How can it be said that these parties had a *bona fide* pre-emption claim under *color of the Laws of the United States?*

Their own declarations negative any such pretense. The declaratory statements which they offered at the United States Land Office they knew to be an idle ceremony. They did not claim the land under the pre-emption laws of the United States, because they knew, or thought they knew, that the lands were not United States lands. They settled upon them thinking that the railroad grant would be forfeited at some time in the future, and when that was done they designed to claim them under the pre-emption laws. Independently of the question of good faith, they had no pre-emption claim, arising or asserted by actual occupation of the land, *under color of the Laws of the United States.*

So in Hugh Finan's case; even if he had settled upon the land before May 1, 1888, and tendered his declaratory statement, he could not be considered as having a claim under the laws of the United States. He says:

"At the time I settled on the land I understood that it was belonging to the grant to the Brule River and Ontonagon Railroad Company and was going to be reverted back to the Government."

Cunningham, Rec., p. 146.

Even if these claims could be regarded as arising or asserted under color of the laws of the United States, they are not bona fide pre-emption claims.

The facts shown by their testimony, above cited, negative any possible claim of *bona fides*.

They not only believed the title to be in the State of Michigan, and therefore not subject to pre-emption entry, but they knew that they were embraced in the grant to the State for the canal company. Cunningham had heard of this before he went onto the land, and when he made his application to file a declaratory statement, he was informed that it had been certified to the State of Michigan for the canal company (Rec., pp. 144, 145). The Register and Receiver endorsed their rejection upon the application for that reason, and returned it to him (see p. 146).

Donahoe also had heard of the canal company's claim to the land, and was told of it by the party who located him. His claim was rejected by the Register and Receiver, on the ground that it was in conflict with the canal selections, and he took an appeal to the Commissioner of the General Land Office (Donahoe, Rec., p. 15).

These parties made their settlement, then, not only knowing or believing that the land was not United States land, but also knowing and being informed by the Register and Receiver that it had been granted to the State for canal purposes, and deliberately

decided to make the settlement with the expectation and determination of contesting the canal company's claim. If this can be called a *bona fide* pre-emption claim, it is difficult to understand how there could be one not *bona fide*.

In passing the forfeiture act and confirmation of State selections Congress evidently desired, if there were any of the lands embraced within the general language of the confirmatory clause, upon which settlements had been made, declaratory statements or homestead applications filed, and allowed by the Land Office, and which were occupied by the settlers in good faith, in reliance upon such location and allowance, on May 1, 1888, that such pre-emption or homestead claims should be confirmed, instead of the State selections or private entries.

The term "*bona fide*" cannot be applied to a person who purchases or settles upon land with full notice of the adverse claim. Even if the declaratory statements had been accepted, and the claimants had settled on the lands with full knowledge of these adverse claims, with full knowledge of the fact that the land was not subject to pre-emption, they could not have been considered *bona fide* pre-emptors. Much less could they be so considered when, on making application for the land, they were distinctly informed by the Register and Receiver that the land was not subject to pre-emption entry, and their application was rejected.

We do not mean to be understood as asserting that there can be no *bona fide* pre-emption claim in any case where the application of the claimant is rejected. What we do say is, that where such claim is rejected for the reason that the land is not subject to pre-emption, and it turns out as a matter of fact that it was not subject to

pre-emption, there can be no *bona fide* pre-emption claim.

In these cases, if our contention is correct, the lands were not subject to pre-emption, and the applications were properly rejected.

But if the contention of the pre-emption claimants is correct, that the lands were *State lands* at the time they settled upon them, and continued to be such until March 2, 1889, still they were not subject to pre-emption. In neither case could they acquire any rights or be *bona fide* pre-emption claimants.

In the case of Hosmer vs. Wallace, 97 U. S., 575, an Act of Congress approved July 23, 1866, to quiet titles in California, was reviewed. That act provided that nothing in it should be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants. The Court says :

" The term *bona fide*, as applied to the pre-emption claimant, does not change the qualifications of such claimant, nor the conditions upon which, under the general law, a settlement with a view to pre-emption is permitted."

Concerning these conditions the Court further says :

" Under the pre-emption laws, as held in Atherton vs. Fowler (96 U. S., 513), the right to make a settlement is to be exercised on unsettled lands ; the right to make improvements is to be exercised on unimproved land ; and the right to erect a dwelling house is to be exercised on vacant land : *none of these things can be done on land when it is occupied and used by others.*"

Upon this ground, although the title of that other person was invalid, the Court held that a pre-emption claim, complete in all other respects, was not *bona fide* but invalid.

In the case of Atherton vs. Fowler, referred to, 96 U. S., at page 516, the Court, by MILLER, J., discussing this question of pre-emption rights, says :

"It is not to be presumed that Congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders."

Apparently this leaves no question open under this head except as to the fact of the occupation of this land by the canal company at the time of the attempted usurpation by the defendants.

In Geeen vs. Liter, 8 Cranch., 229, Mr. Justice STORY says:

"And this leads us to say that even if at common law an actual *pedis possessio*, followed up by an actual perception of the profits, were necessary to maintain a writ of right, which we do not admit, the doctrine would be inapplicable to the waste and vacant lands of our country. The common law itself in many cases dispenses with such a rule, and the reason of the rule itself ceases when applied to a mere wilderness. * * * We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seisin thereof, in deed, to the grantee, and attaches to him all the legal remedies incident to the estate; *a fortiori*, this principle applies to a patent; since at the common law, it imports a livery in law."

Other paragraphs in this connection are well worth reading.

The opinion in this case is followed up in Barr vs. Gratz, 4 Wheat., 213. In that case Mr. Justice STORY says:

"Upon the issuing of the patent to John Craig in November, 1874, he became by operation of law, vested with the constructive actual seisin of the whole tract of land included in his patent."

So, also, in Draper vs. Shoot, 25 Mo., 197, 204, it is held that *payment of taxes* is evidence to be considered by a jury in connection with other circumstances in determining the question of possession.

The canal company held under what is equivalent to a patent from the United States. Aside from the acts of occupancy and possession by the canal company, which are shown by the evidence (Rec., pp. 102, 103), this patent vested in the company a constructive seisin, which was invaded by the pre-emption claimants.

In the case of Dawson vs. Grow, 29 West Virginia, 333, it was held that

"No party ought to be entitled to the favorable position of a *bona fide* holder of land, unless he entered and improved in a case and under a title which appeared to him, after diligent and faithful inquiry, to be free from suspicion."

In Green vs. Biddle, 8 Wheat., 79, it was said by the Court (STORY, J.):

"That under the civil law a *bona fide* possessor is one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better title to it," and that, after having such notice, "he becomes a *mala fide* possessor and holds at his peril."

In Woodhall vs. Rosenthal, 61 N. Y., 397, discussing the question whether the defendants in ejectment were entitled to the value of the improvements they had made, on the ground of being *bona fide* occupants, the Court says:

"As the defendants had full means of knowledge of the plaintiff's claim, they cannot bring themselves within the rule."

In these cases the pre-emption claimants not only had full means of knowledge, but actual knowledge that their claims were not good. The natural and only place for them to inquire whether the lands were public lands of the United States, and subject to pre-emption, was at the United States Land Office. They did in-

quire there, and were notified that the lands were not subject to pre-emption, and this notification confessedly was true. They were also advised before going to the Land Office that the lands were State lands, and it was under that claim that they entered, with the intention of claiming them under the pre-emption laws when, if ever, they should become subject to pre-emption.

The confirmation of pre-emption claims could not have been intended to confirm the acts of individuals in squatting upon the land.

Confirmatory acts are passed to make good certain acts of officers or others representing the Government, which were not valid when done. This confirmatory clause would very properly apply to acts of officers of the Land Department in allowing pre-emption or homestead entries, which were invalid at the time, but the language is not appropriate for *granting rights* to parties who have, contrary to the provisions of law, squatted upon lands not liable to pre-emption or other entry. Something more than a confirmation would seem to be needed in such case. We contend, then, that, in these cases, what are called pre-emption claims, are not pre-emption claims at all, and are not covered by the language of the confirmatory clause.

The decision, not only of the Register and Receiver, but of the Commissioner of the General Land Office and Secretary of the Interior, is that these pre-emption claims are void. In other words, the Interior Department, the only tribunal having jurisdiction to decide that question, decided that bona fide pre-emption claims in these cases did not exist.

VII.

The Act of March 2, 1889, expressly confirmed the title of the canal company to the lands in question.

It has been strenuously urged, and it was so held at first by Judge SAGE, and reluctantly concurred in by Judge SEVERENS *(ante,* p. 110 *)*, that the provisions of Section 3 of the Act of March 2, 1889, taken in connection with other parts of the same act, did not operate to confirm the State selections under the canal grant.

On a subsequent argument of the same question before the same Judges on the question of the issuance of an injunction, both agreed that the first conclusion was erroneous, and that, beyond all question, the confirmatory provisions of Section 3 did apply to these State selections *(ante,* p. 110 *)*. A printed copy of that opinion is appended to this brief *(post,* p. pp. 169-172 *)*.

The text of the Act of March 2, 1889, is reprinted in full in the appendix to this brief *(post,* p. 164 *)*.

It is not pretended that the disposal of these lands in the manner we have shown, "selected," as they were, by an agent of the State of Michigan under the granting Act of Congress, certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior, is not embraced within the term "*State selections * * * confirmed by the Secretary of the Interior.*"

We think we may consider it as conceded—certainly, it is unquestionably true—that, if there were nothing in the act which would modify the effect of these words, there could be no question but that the act would operate to confirm the canal company's title. The clear,

unambiguous meaning of the words used would not permit of any other construction.

But the claim is that a previous part of the act must be so construed as to lead to the conclusion that Congress, in using the words quoted in the third section, did not intend, in so using them, to give them their full natural force and effect. In other words, it is sought to show, by reference to prior provisions of the act, that Congress, without expressly making an exception to the provisions of section three, yet intended one should be *implied*. It is susceptible of demonstration that Congress had no such intention.

NO PART OF THE ACT IS INCONSISTENT WITH THE NATURAL, PLAIN CONSTRUCTION OF THE LANGUAGE USED IN SECTION THREE.

That which is claimed to have that effect is contained in the proviso to section two, to wit:

"That this act shall not be construed to prejudice any right of the Portage Lake Canal Company or the Ontonagon and Brule River Railroad Company, or any person claiming under them, to apply hereafter to the courts, or to Congress, for any legal or equitable relief to which they may now be entitled, nor to prejudice any right of forfeiture, as hereby declared, or recovery of the United States, in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies, or their assigns, under the laws of the United States."

If this provision *can stand*, together with section three, as interpreted by us, then our construction must be correct.

The provision in Section 2, *supra*, that the act "*should not be construed to prejudice the right of the Portage Lake Canal Company, or any per-*

son claiming under them, to apply to the courts, or to Congress, for any legal or equitable relief to which they might be entitled" is certainly in no way inconsistent with the provision in Section 3 confirming the title of the canal company, at least when such confirmation is made subject to the claims of certain homesteaders or pre-emption claimants who have undertaken to acquire rights in the lands since the certification of the lands to the canal company.

The canal company might deem itself entitled in equity to have its title recognized or confirmed, either by the courts or by Congress, *as against the homesteaders and pre-emption claimants*, whose claims are protected by the last proviso of the third section.

The confirmatory clause if the canal company's title must depend upon that, is not what it ought to be, nor what in law and equity the canal company had a right to expect.

It is provided, therefore, that the act is not to be construed (if it otherwise could be so construed) to prejudice the right of the canal company to apply to the courts or Congress for "any legal equitable relief to which it may now be entitled" (Sec. 2).

The proviso may have been unnecessary, for it would be impossible for Congress to take away that right; but the object of it was explained by the Senator who introduced it, and we shall refer to it further on. Nevertheless, the act, by abundant caution, guards that right, and it is a valuable right, in connection with that portion of the lands the title of which is not confirmed by section three.

"*Nor to prejudice any right of forfeiture, as hereby declared, or recovery of the United States, in respect to any of the lands claimed by said companies.*" Certainly

there is nothing in this clause that can in any way interfere with the operation of section three, construed as defendants claim it should be.

Congress did not undertake by this act to forfeit all the lands that had been granted for railroad purposes by the Act of 1856, but only those coterminous with the unconstructed portions of the several roads, but it provided that nothing in the act should be construed to prevent it from hereafter going farther with the forfeiture if it should wish to do so. Without such a reservation there might be a question of nice, technical law whether Congress could pass a second forfeiture act.

It had been claimed by some that the conditions of the act granting lands for the construction of the Portage Lake Canal had not been complied with, and that proceedings ought to be had for a judicial forfeiture. That claim had been made in Congress, and resolutions were at one time introduced for the purpose of directing proceedings to that end. It was therefore provided in this act that nothing therein contained should be construed to prejudice the right of the United States to institute any such proceedings to have such forfeiture declared.

"*Nor to the prejudice of the right of any person claiming adversely to said companies, or their assigns, under the laws of the United States.*" There is nothing here inconsistent with our construction; not in the least.

Whoever, *at the time of the passage of that act*, had acquired any rights against the canal company, under the laws of the United States, could still maintain those rights, and nothing in this act should be construed to prejudice them. The act does not in any way prejudice such persons in asserting such rights against the canal company or its assigns.

Also the rights of persons, *created by said act*, that is to say, homestead and pre-emption claims, *which were, up to that time, void*, but which were given validity by the act itself, if there are any such, are not to be prejudiced by any of the provisions of that act. But no rights could be acquired *after* the passage of the act, which would be protected by it, as against the title of the canal company, because its title was confirmed.

There is no conflict, then, between the proviso of the second section and the confirmatory provisions of the third.

But it is claimed that the proviso of the second section gives a specific remedy to the canal company, and therefore it was not intended that it should be embraced within the general confirmatory provisions of the third section.

It is not easy to see what remedy is given the canal company by the proviso of the second section. It has the right to apply to Congress for relief, but the right of petition is secured to every citizen by the Constitution. It has a right to apply to the Courts to sustain its legal or equitable rights. It had that right before, and Congress could not take it away.

Here, then, is no remedy or provision made *for the relief of the canal company.*

The object of the proviso to Section 2 is fully explained by Senator Hoar, who introduced it as an amendment when the General Forfeiture Bill was before Congress in May, 1888 (Reprint of Debates herewith submitted to the Court, see pp. 2, 3, 6, 14).

It was objected by several Senators that the clause was entirely unnecessary; that the right to apply to

Congress for relief, or to the Courts, was not affected by the bill, and could not be. But it was explained that the canal company and the railroad company might deem that they had equities which, if properly presented before Congress, would be regarded favorably, but that they might be met with the objection that these matters had all once been considered by Congress and disposed of, whereas this proviso would show that such was not the intention (Reprint of Debates, pp. 2–14).

The words "State Selections," used in section three, must be given their full force and effect, and include the canal selections unless the contrary appears.

The intention of the Legislature is the thing to be sought for. As is said by the Court in the leading case of People vs. Insurance Company, 15 Johnson, 353:

"Such construction ought to be put upon a statute as may best answer the intention which the makers had in view, and this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered it ought to be folfowed with reason and discretion in the construction of the statute, *although such construction seem contrary to the letter of the statute.*"

In this case we do not need to contend that Congress intended something *different* from the natural meaning of the words used, but we have merely to combat the proposition *of the other side*, that Congress intended something different from the natural meaning of the words used.

We have endeavored to show that the construction

we contend for is not inconsistent with the proviso of section two, and that both can stand and operate together. That would seem to be sufficient to lead to the conclusion that it was not the intention to restrict the meaning or *imply* an *exception* to the language of section three.

But we may look further to ascertain the intent of the Legislature.

It is a well-known rule that we may take into consideration the previous state of the law, and the mischiefs which the enactment was intended to remedy.

The condition of titles within the limits of this grant is matter of familiar history. About 1881 the validity of private land entries by cash, warrants or scrip, and "State selections" within these limits began to be called in question. It was discussed in Congress, referred to committees, and was the subject of reports from committees and from the officers of the Interior Department. The position was taken by some that the railroad grant had not been lawfully and fully surrendered to the United States, and others considered it doubtful. The effect of that condition of things on the title of the lands embraced in the canal grant within those limits was particularly discussed, and the confirmation of the canal company's title, as well as that of private persons who had entered lands in good faith, was recommended. (see report of Commissioner Williamson to the Secretary of the Interior, January 5, 1881, Record, p. 118, and report of N. C. McFarland, Commissioner, to the Secretary of the Interior, October 20, 1881, Record, p. 123; also report of Senate Committee on Public Lands, January 28, 1881, Record, p. 128).

It is also matter of public history that the different

parties whose titles within said limits might be considered uncertain were making application to Congress from time to time from 1881 until the passage of this act to confirm their entries so as to place them beyond doubt.

The titles so sought to be confirmed were those obtained under cash entries, scrip entries and a few homestead entries, and also those holding under these canal "State selections."

The only claims under "State selections" that Congress was ever asked to confirm, within those limits, were the "State selections" under this *canal grant of 1866*. In all the reports of the officers of the Interior Department and the Congressional committees, in which the full history of the condition of things within this grant was given, *no mention is made of any "State selections" except canal selections.*. So far as can be ascertained, and we think we may assume it as an unquestioned fact, there were no other "State selections" that would be affected by the forfeiture act. Congress, in using the term "State selections," must be supposed to have known what they were legislating about. They must be supposed to have had reference to the only "State selections" which had been before them—the only ones that required any legislative confirmation.

It is proper for the Court, in construing the statute, to place itself as nearly as possible in the position of Congress at the time the statute was enacted. The Court may take into consideration, and ought to do so, the condition of things *as known to Congress at the time*, and the apparent necessity for the remedy. Acting upon that view, the Court is able to say, from the history of Congressional proceedings, that the

State selections for this canal grant were the only "State selections" that could have been referred to by section three of the Forfeiture Act.

In the whole range of the debates no other State selections except the canal selections were referred to (see debates herewith submitted, *passim*).

In Furman vs. City of New York, 5 Sanford, 16, the Court looked to the *petition for the act* to see what was its object and intent. Other authorities are referred to below.

The Court may also examine the order of the amendments to the act to see how it was built up and constructed, in order to get at the intention of Congress.

Marshall vs. National Bank, 23 Wallace, 307.
Also cases cited *infra*.

We have prepared, as above stated, a reprint of the debates in Congress on this bill, and those from which it was constructed, and submit it as part of this brief, so that the Court can see how the Act of March 2, 1889, was built up, and learn from the statements of those who advocated as well as those who opposed it what was the condition of things to be remedied, and the remedy intended to be applied. We refer to it under title of "Debates."

All the provisions of this act formed part of the bill that was settled upon and passed by the Senate in 1888 for the forfeiture of all railroad grants in the United States, so far as they lay opposite the unconstructed portions of the respective lines of road, except Sections 4 and 5, which were added to that bill by a

conference committee of the two Houses, and reported the day before the passage of this act.

When the General Forfeiture Bill was under consideration in the Senate, May 2, 1888, the proviso to section two (Section 4 of that bill) was introduced by Senator HOAR for the purpose of protecting the rights of the canal company (Debates, p. 2). Senator PALMER, lest the canal company should get some advantage over the Ontonagon and Brule River Company, proposed to amend by inserting the name of the latter company, which amendment was accepted by Senator HOAR (Debates, pp. 3, 4). The explanation and object of that amendment is given in the discussion, and is such as we have before stated. The proviso was finally gotten into the precise shape in which it appears in the Act of March 2, 1889, and was adopted May 3, 1888 (Debates, p. 14).

Up to that time there had been no attempt to have a confirmation of the canal selections, and private entries, but *after* the adoption, May 3, 1888, of said proviso to Section 2, Senator SPOONER, of Wisconsin, offered an amendment for the purpose of confirming the title of 1,200 cash and scrip entrymen (Debates, p. 14, 50). Pending the consideration of that amendment Senator HOAR on May 8, 1888, offered a further amendment providing for the confirmation of *State selections.* (Debates, p. 86). His only and avowed purpose was to protect the Canal Company (Debates, pp. 85, 86, 87, 93). The proposition was discussed at great length and was finally adopted in the precise form we have it now saving the rights of *bona fide* homestead and pre-emption claimants (Debates, pp. 86, 122). The amendment was agreed to in that form and the bill as so constituted passed the Senate, (Debates,

p. 120; Reconsidered and amended May 10, 1888, and again passed, *Ib.*, pp. 120, 122).*

In the House an amendment in the nature of a substitute was proposed which merely forfeited *all railroad grants in the United States* where the railroads had not been constructed within the time required by the granting acts (Debates, p. 128).

The bill went before a conference committee of the two Houses and remained there until the day before the passage of the act we are considering (Debates, pp. 122 to 138).

In the meantime a bill had been introduced in the

*** Synopsis and Index to Debates Which are Separately Reprinted and Filed with this Argument as Part Thereof.**

1888. BILL 1430, to forfeit all unearned grants in United States (see p. 125, Debates).

POLICY OF COMMITTEE—viz., to forfeit and stop there, and let parties affected come afterwards to Congress or go to the Courts (Debates, pp. 2, 4, 90).

History Proviso to Sec. 2: Canal company in it, and Dawes and Hoar represented it (pp. 2, 90). DAWES (Debates p. 1), HOAR'S amendment (pp. 2, 3), PALMER'S amendment (p. 4), BERRY'S amendment (p. 5), rejected (p. 14).

May 3, 1888. *Hoar-Palmer* proviso passed (Debates, p. 14).

NOTE.—A. *Proviso* to Sec. 2, Act March 2, 1889, is the Hoar-Palmer amendment literally, with the added words *as hereby declared.*

B. Was meant for the two companies' (Canal and Brulé River) benefit; now sought to be used to knife and injure them.

C. Was passed at time when the policy was not to act on or confirm titles, and when Sec. 3 had not only not been born, but not even proposed.

See page 85 as to text of what was adopted May 8 (p. 85).

This left canal company out in the cold.

SENATOR HOAR (pp. 85, 86) then enters the arena for the canal company (Debates, pp. 86, 87).

His amendments (p. 86).

Its sole purpose and effect were declared to be to protect the canal company (pp. 87, 93).

Senate (Senate No. 858) for the purpose of forfeiting the MARQUETTE AND ONTONAGON land grant opposite the unconstructed portion of the line of road. This bill passed the Senate September 19th, 1888 (Debates, p. 130). This bill came up for consideration in the House on the 21st of the same month, and was there amended so as to forfeit the entire grant lying opposite the *completed* as well as the *uncompleted* portions of the road, and also to extend its operation to lands granted in the construction of a railroad from ONTONAGON to the WISCONSIN State line (Debates, pp. 130 to 132). The Senate, December 21st, 1888, refused to concur in the

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Spooner's amendment had only one general opponent, Senator CALL, of Florida.

SENATOR DOLPH opposed it because it left out canal company (pp. 26-28).

SENATOR PALMER did not oppose the principle of the Spooner amendment, but wished the settlers protected.

His two amendments (Debates, p. 35).

First amendment adopted (Debates, p. 84).

Second amendment withdrawn and substitute offered (Debates, p. 47). Voted down (p. 84).

Spooner's amendment adopted (p. 84).

RESULT was that Spooner got private entries confirmed subject to pre-emption and homestead rights existing May 1, 1888.

SPOONER'S AMENDMENT TO BILL No. 1,430 (p. 14) was debated May 3d (pp. 15-33); May 7th (pp. 15-56); May 8th (pp. 56-105); May 9th (pp. 105-120); May 10th (pp. 120-122), when it passed Senate (p. 122).

SPOONER AMENDMENT, page 14:

He represented interests of private entrymen—a large interest, identical with canal company—the same technical objection (both in Michigan) applying to both, 51,600 odd sections sold by United States, 78,200 even sections sold by United States; 1,200 persons interested (Debates [Spooner], p. 50). This amendment became Section 3, Act March 2, 1889, with Hoar's amendments thereto, for avowed benefit of canal company, against Palmer's opposition, and with Palmer's amendments thereto for the benefit of settlers.

THE DEBATES, May 8, 9, 10 (from pp. 85-122), occupied ALONE

amendments made by the House and appointed conferees; the House, January 3d, 1889, insisted on its amendments and also appointed conferees (Debates, 132).

March 1st, 1889, the conference committee to which the *original forfeiture bill* had been referred, agreed upon and reported a forfeiture bill, except that they were unable to agree upon the provisions of Section 1, the Senate adhering to its purpose of saving the rights of railroad companies in lands opposite the completed portions of the road, and the House insisting upon its original proposition. The Senate concurred in the re-

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with the question whether the canal selections should be confirmed, and yet they say the canal company not in it!

SENATOR PALMER fought Hoar's amendment tooth and nail because it confirmed canal grants (Debates, pp. 88, 119).

SENATOR STOCKBRIDGE was in favor of canal confirmation (Debates, pp. 98, 99).

Nothing else but canal company's rights debated.

SENATOR TELLER supports Hoar (Debates, pp. 93, 94, 100).

SENATOR GEORGE supports Hoar (Debates, pp. 107, 108).

HISTORY OF THE WORDS "*or under State selections in Michigan confirmed by the Secretary of the Interior*" (Debates, pp. 85, 86, 87, 88, 93, 98, 99, 101).

Apt words—"*State selections confirmed by the Secretary of the Interior*" apt words to describe canal lands.

Canal Act, 1865, "granted 200,000 acres" to the State, "to be *selected* by an agent or agents appointed by the Governor of said State, subject to the approval of the Secretary of the Interior."

Canal Act, 1866: "Said lands shall be *selected*," &c.

No mention made in any of the debates of any "State selections" except canal selections (see Debates, *passim*).

HISTORY OF WORDS "*or any tract in such State selection*" (Debates, pp. 108, 109, 113, 121, 122).

These words put in expressly because the canal company's title was neither a sale nor entry (Debates, pp. 108, 109, 113).

Final passage (Debates, pp. 118, 119, 120, 121, 122).

Second conference report March 2, 1889 (Debates, p. 139).

SENATOR PLUMB'S statement in Senate (Debates, p. 141).

MR. ALLEN'S in House (Debates, p. 142).

port and as to the remaining points of difference appointed managers on the part of the Senate for further conference (Debates, pp. 133 to 138). The proviso to Section 4 of the bill so reported was identical with that in the original forfeiture bill as presented by the Senate and with the proviso to Section 2 of the act we are considering; and Section 9 of the bill so reported was identical with Section 9 of the original forfeiture bill as it passed the Senate, except that, in the former, in the clause confirming homestead and pre-emption claims, the words " by actual occupation of the land," were inserted after the words " arising or asserted," and was identical with Section 3 of the act we are considering.

It is a matter of history that in the latter part of the session of 1888–89 a large number of persons claiming homesteads and pre-emptions within the Marquette and Ontonagon Railroad grant, as well as within the Ontonagon and State Line grant, were petitioning Congress to declare a forfeiture of these grants. The result was that just on the eve of the adjournment of Congress, the committee of conference, to which these bills had been referred, being unable to agree on a *general* forfeiture bill, framed the forfeiture bill of March 2d, 1889, by taking the Section 1 of the general forfeiture bill as it had passed the Senate, and the remaining sections bodily from the conference report of March 1st, and only making such changes as were necessary to confine its operation to Michigan. This bill was reported by the conference committee as amended Senate Bill 858, and the report was concurred in by both Houses on the same day. Debates, pp. 139, 142). **Hence it will be seen that at the time the PROVISO TO SEC-**

TION 2 of this act was built up, put in form and settled upon, the CONFIRMATION OF TITLES HAD NOT BEEN PROPOSED OR CONSIDERED. That proviso, in the minds of the legislators, could have no bearing upon the provisions of Section 3, because THEY HAD NOT YET BEEN PROPOSED.

After that, however, Congress decided to *go further* than it had originally intended, and settle the question of title between the several parties claiming the lands. They did so, and, as we have contended, used appropriate language to completely settle and confirm the title of the canal company, as well as cash and scrip entrymen (see Debates, *inter alia*, p. 86 *et seq.*, pp. 118, 119, 122, 141, 142).

We may look to the declared object of the statutory provision as appearing in the Congressional debates.

It is true it is sometimes said that the *opinions* of individual legislators, expressed in debates upon the bill as to the *meaning of words or provisions*, are entitled to but little weight.

So far as we have observed, these remarks have been made only in cases where the opinions of the members of the Legislature, as to the effect or force of certain provisions of an act, are attempted to be used to aid in the construction of the act.

In this case the amendment relating to "State selections" was introduced, and stated by Senator HOAR, who introduced it to be, for the *very object, and the sole object, of confirming canal selections.* It was advocated by him, and by others, on *that ground alone*, and op-

posed by Senator PALMER and others on the *sole ground that the canal selections ought not to be confirmed.* **During the whole of the long discussion it was not intimated or suggested by any one that it would not apply to the canal selections, or that there were any other selections to which it could apply** (Debates, pp. 87, 122).

The object, as before stated, is to ascertain *the intent of Congress.* Did Congress intend to exclude *canal selections* from the term "*State selections?*"

When the entire discussion shows conclusively that Congress had in mind these very canal selections, and no others, is the Court bound to shut its eyes to that source of information and assume that Congress intended exactly contrary to what every one who reads the debate, including the members of the Court in their individual capacity, must *know positively* that they did intend?

The Constitution of the United States requires each House to keep a journal of its proceedings, which is to be published from time to time (Constitution, Art. 1, Sec. 5, Subdivision 3). The Revised Statutes provide for printing the debates of Congress (Sec. 78). These journals, so printed, are the official record of what takes place in Congress. Certainly the Court has a right to refer to them as a part of the *history of the acts* under consideration.

"Journals of Congress and State Legislatures are evidence," says this Court, in Watkins vs. Holman, 16 Peters, 56.

In the case of Green vs. Graves, 1 Douglass (Mich.), 351 (see p. 365), the Court refers to the journal of the constitutional convention and the opinions expressed

on the subject of the clause under consideration, in order to aid in the proper construction of that clause, and the Court uses the following language:

"Who that is familiar with the opinions of the convention, or has consulted the journal of its proceedings upon the subject of corporations, can hesitate as to the true construction of the clause relating to this subject?"

In the case of the United States vs. Souders, 2 Abbott, 456, DIXON, Justice, says:

"In construing a statute, it is one of the fundamental rules to ascertain the intention of the law makers. Where the words do not clearly disclose this intention, it is proper to consider what was said or done by the law-making power while the subject matter was under discussion, in order to arrive at their meaning."

In that case the fact is referred to that the different sections of the act under consideration were the work of many minds and "that the law gradually grew from a single proposition, including only one object, into a complex one embracing several." The learned Judge further discusses the manner in which the act WAS BUILT UP, and the *order of the adoption of the several portions of it*, as bearing upon the intent of Congress in adopting the several provisions.

In the case of Harrison vs. Hadley, 2 Dillon, 229, the Court, CALDWELL, Justice, referred at considerable length to the history of the enforcement act, the proceedings in Congress on its passage, and the language of reports of committees upon it, for the purpose of throwing light upon the proper construction of the act.

The declarations of SENATORS on the discussion of these provisions are useful, not only as showing what the LEGISLATORS

understood they were doing, but they are also an official statement of the "occasion and necessity of the law, the mischief felt and the remedy in view."

Green vs. Graves, 1 Douglass (Mich.), 354.

In the case of Warner vs. Beers, in the Court of Errors in the State of New York, 23 Wendell, 103, the Court referred to the journals of the Legislature and the history of a law to aid in its construction. By VERPLANCK, Senator, page 140, it is said :

"It is a general principle of legislative interpretation that the declared or obvious intention of the Legislature is always entitled to the highest respect in the interpretation of their statutes. For the reasons above stated, the external evidence of acknowledged facts in the political history of our State is good authority to indicate that intent. The same intention may also be shown *from our journal, the very highest documentary history*, and to which I doubt not Courts may refer for the meaning or intention of the acts."

The President of the Senate (p. 179) quotes from the language of the committee reporting the bill, and refers to the history of the act, for the purpose of giving it its proper construction.

In the case of Platt vs. Union Pacific Railroad Company, 99 U. S., 48, in regard to the construction of an Act of Congress, STRONG, Justice, says :

"All will concede that, in construing the Act of 1862, we are to look at the state of things then existing, *and in the light then appearing* seek for the purpose and objects of Congress in using the language it did, and we are to give such construction to that language, if possible, as will carry out the Congressional intention."

For this purpose it seems to us clear that the reports of committees, reports of public officers to Congress or laid before Congress, as well as the statements of mem-

bers of Congress themselves as to the "*state of things then existing*" *and the evils to be remedied*, are the most reliable authority or data, and should be so considered by the Court.

In the case of Ah Kow vs. Nunan, 5 Sawyer, 552, 560, Justice FIELD (SAWYER, J., concurring) says, in construing an ordinance adopted by the Board of Supervisors :

"The statements of Supervisors in debate, on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the *meaning of the terms used;* but they can be resorted to for the purpose of ascertaining the GENERAL OBJECT OF THE LEGISLATION PROPOSED, AND THE MISCHIEFS SOUGHT TO BE REMEDIED. Besides we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats as Judges, we are not struck with blindness, and forbidden to know as Judges what we see as men."

In the case of Edger vs. Board of Commissioners, 70 Ind., 358, the Court says : "Where, as in this case, a statute has been enacted which is susceptible of several widely different constructions, we know of no better means of ascertaining the will and intentions of the legislators than that which is afforded, in this case, by the *history of the statute* as found in the *journals of the legislative bodies;*" and it is held that the Court may properly "resort to the journals of the two legislative bodies, to learn therefrom the *history of the law* in question *from its first introduction as a bill until its final passage and approval.*"

The statute was intended to be remedial, and therefore should have liberal construction.

Sedgwick on Construction, 308, pp. 9 and 10.

Opinion SEVERENS, J., in Cunningham Case, Record, p. 186.

In is indisputable that the object of Congress was to settle, as far as possible, questions of title that were uncertain, owing to the condition of this land grant at the time the titles or claims were acquired, so far as it could be done.

Senator PLUMB'S Remarks, Debates, p. 141 (Read it).

The language of the statute should be *extended*, if necessary, in order to fully and completely carry out the *intention of Congress* in that respect. The construction which is contended for on the part of our adversaries is exceedingly strict, and seeks to *limit* the operation of the remedial words used by Congress instead of to give them their full effect.

IT IS ALSO A RECOGNIZED RULE OF CONSTRUCTION THAT IF THE LATTER PART OF A STATUTE BE REPUGNANT TO THE FORMER PART THEREOF, IT SHALL STAND, AND SO FAR AS IT IS REPUGNANT BE A REPEAL OF THE FORMER PART, BECAUSE IT WAS LAST AGREED TO BY THE MAKERS OF THE STATUTE.

Sedgwick on Construction, 356, citing Bacon's Abridgment Statute D.

Section 3 follows the proviso that is said to be inconsistent with it, and under this rule it should prevail. It is not inconsistent, however, although it does away with the necessity, so far as we can see, of the canal company's availing itself of the right granted or referred to in Section 2, except in the case of contests with pre-emption and homestead claimants. Section 3 might modify and limit the application of Section 2 if they were inconsistent, but it can not be restricted or controlled by it.

We submit, then, that whether we consider the language of the act itself, or its history, the manner in which it was constructed, or the condition of things existing at the time and the evils to be remedied, or the object and purpose of the provision in question as declared by its authors when it was presented to Congress for action, we must inevitably come to the one conclusion that Congress in confirming "State selections" intended to confirm and did confirm *these* selections made by the State under the Canal Grant of 1866.

As to this Act of March 2, 1889, we may, in conclusion, properly observe that, at the first trial of the Cunningham case, the decision of the Court was in favor of the canal company's titles on the merits, aside from the Act of March 2, 1889. The confirmatory effect of that act was, therefore, not debated or considered on that trial. This act was referred to on the motion for a new trial made by the defendant Cunningham, which was heard by and before JACKSON, BROWN and SEVERENS, JJ., with the result that the Court did not decide the question, but left it open for determination, on the new trial which they awarded (Record, p. 26, end of Opinion of JACKSON, J.).

On the new trial, as before stated, SAGE, J., reached the conclusion that the canal company's title was not confirmed by the Act March 2, 1889, in which, with doubt and hesitation, SEVERENS, J., concurred. The counsel for the canal company, knowing that in point of fact it was the distinct purpose of Congress by Section 3 to confirm their title, had not made that thorough examination and preparation which they found to be necessary after the opinion of Judge SAGE, reluctantly concurred in by Judge SEVERENS. Thereupon, they selected and printed the reports and debates above re-

ferred to, showing the legislative history of the act and the manner in which the different provisions thereof were built up and the order in which they were adopted; and when, subsequently, this was presented in full before SEVERENS and SAGE, JJ., they both reached the conclusion that the purpose of the third section of the Act of March 3, 1889, was to confirm the title of the canal company. They were very emphatic in this opinion, regarding the question as beyond all doubt. Their opinions will be found in the appendix to this brief (*post*, p.p.), and we confidently submit that whoever makes this examination cannot resist the conclusion, which is as clear as daylight and really admits of no doubt, that such was the specific intention of Congress.

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VIII.

It was erroneously held by the trial Court that in those cases in which the plaintiff's title might be found to depend upon the confirmation of the Act of March 2, 1889, the plaintiff could not avail itself of such confirmation in such of the suits as were commenced before the date of the confirmatory act.

It seems to us that this is erroneous, as the act confirms the acts of the officers of the Land Department, and makes valid what was not so before. If that is correct, the confirmation makes the act valid from the beginning, or relates back to the time the act was done.

The Act of March 2, 1889, is more than a mere conveyance by way of confirmation. It is a law as well as a conveyance (Ryan vs. Carter, 93 U. S., 78, 82; Langdeau vs. Hanes, 21 Wall., 521, 529; Tripp vs. Spring, 5 Sawyer, 209, 216, FIELD, J.). If the canal company's title was defective, it intended to cure it, and to cure it from the date when the lands were disposed by the certification May 19, 1871, by the Secretary of the Interior, to satisfy the canal grant. The rights of the canal company are precisely the same as if its title was originally good by virtue of the certification of May 19, 1871. The defendant had acquired no intervening rights. The Sovereign had the right to so declare and enact. It did so declare and enact, and there is every reason growing out of the equities which moved Congress to make the confirmation why the healing provisions of the act should apply to the pending suits of the confirmee as against wrongdoers and intruders upon the land. Any other view curtails the confirmation of its just effect. The lands had been earned by the canal compay and the canal certified by the Governor to have been completed as far back as 1875. Meanwhile the canal company paid all the taxes. The confirmatory act is based upon these equities, and it was because of these that Congress confirmed to the canal company and made whole its original source of title from the date of the certification by the Interior Department. On the ejectment trial against an intruder the canal company's patent (or certificate of the Interior Department, equivalent to a patent) is made valid *ab origine*, and has the same effect as if it had been valid *proprio vigore* when it was issued. The principle that you cannot support ejectment by a title obtained subsequent to action brought, has no application. This Act of Congress gives us title from the date of

the original certification, May 19, 1871, for *all* purposes, and among others for the purpose of making our rights effectual in pending suits against trespassers and intruders who had acquired no intervening rights.

This ruling, however, only goes to the question of maintaining these particular suits, and not to the question of right or title of the parties. If correct, it would merely follow that in such cases as depend upon the confirmatory act, and were commenced before its enactment, the plaintiff would merely be under the necessity of bringing new actions.

The case of Hugh Finan, however, was commenced by filing declaration March 21, 1889, *after* the passage of the Forfeiture Bill, so that it is not affected by that technical question.

Conclusion.

In conclusion, we submit:

First. That the title to all these lands, upon the surrender of the railroad company, and of the State, became revested in the United States before their selection under the canal grant, and that the title again vested in the State under the later grant, and passed from it to the old canal company, as we have shown; and the *present company* succeeded to that title by purchase in good faith. If this is so, it results that the judgment in cases of Cunningham (No. 305) and Finan (306) ought to be reversed.

Second. That, if this is not so, at least the 41,000 acres within the "common limits" of the Marquette and Ontonagon branches, the surrender of which was never questioned by the State, was revested in the General

Government by said surrender, and passed through the State and the old canal company to the present company, as above shown, and that the Court was correct in directing a verdict in our favor upon lands situated in said common limits; to wit, in the case of Michael Donahue (see remarks of the trial Court in deciding this case; Cunningham, Rec., p. 41); and that judgment must be affirmed.

THIRD. That, if neither of the foregoing propositions is correct, the title of the plaintiff below was confirmed by the Act of March 2, 1889, and ever since that time has been a perfect title, except in cases where there were *bona fide* pre-emption or homestead claims, arising or asserted by actual occupation of the land May 1, 1888, and

FOURTH. That none of these so-called pre-emption claimants come within the terms of that clause of the forfeiture bill, and hence the judgment in 305 and 306 ought to be reversed.

FIFTH. That, in the case of Hugh Finan (No. 306), in any view that can be taken of the original grant, the canal title is confirmed, as there is no pretense of any pre-emption claim by him existing so early as May 1, 1888, and consequently the judgment in his favor ought to be reversed.

JOHN F. DILLON,
DAN. H. BALL,
For the Canal Company.

APPENDIX.

CERTIFICATES OF COMPLETION OF CANAL.

Certificate of Engineer Holland appointed by Gov. Bagley (Record, p. 100).

MINERAL RANGE RAILROAD COMPANY,
GENERAL OFFICE,
HANCOCK, MICH., *Oct.* 15, 1873.

Governor JOHN J. BAGLEY, *Lansing, Mich.:*

SIR: In compliance with your wish, expressed in your esteemed favor of the 8th inst., that I make a final examination of the Portage Lake and Lake Superior Ship Canal, I have now the honor to report that, as stated in a former letter, I have been unable to examine the details of the work in person, owing to the pressure of other business. I have, however, very recently passed over the entire work, and closely noted all that portion above water, including the piling and piers.

At my request Mr. Samuel Wright, engineer in charge of the Mineral Range Railroad, after a careful perusal of the specifications, has made a careful examination of the work, accompanied by the State Engineer, Hon. J. H. Forster. I beg leave to submit herewith Mr. Wright's report to me, for your inspection, and to remark that I have every confidence in the judgment of Mr. Wright, and should be inclined to give his opinions more weight than my own.

I find also that the work, in many respects, is very much better than the specifications demand, in consequence of the modifications made on the part of the State, which have caused a much larger expenditure of money on the part of the parties constructing the work than the original specifications demanded, all of which expenditures have been in the interest of the State.

From all these facts I am led to the conclusion that

the work has been fully completed according to the original specifications, as modified by the State Engineer, and would therefore recommend the acceptance of the work as fully completed. I have incurred no expense in this examination, but would be glad to have you remit to Mr. Wright say fifty dollars for his services.

I remain, with great respect, very truly yours,

CHARLES E. HOLLAND.

EXECUTIVE OFFICE, MICHIGAN,
LANSING, *Feb.* 12, 1884.

I hereby certify that the foregoing is a true copy of the report of Charles E. Holland, now on file in this office.

WILLIAM STEVENSON,
Private Secretary to the Governor of Michigan.

Report of S. Wright, C. E., of Completion of Canal (Rec., p. 101).

MINERAL RANGE RAILROAD COMPANY,
GENERAL OFFICE,
HANCOCK, MICHIGAN, *Oct.* 15, 1873.

Mr. C. E. HOLLAND:

SIR: In compliance with your request I have inspected the Portage Lake and Lake Superior Ship Canal with a view to a report on the condition of that work.

On the 13th instant I accompanied the State Engineer, J. H. Forster, esq., through the canal by tug, examined with him the piers at the Lake Superior entrance, and the piling and docking of the main canal, and took soundings fairly covering the area of the canal from Portage Lake to Lake Superior, completing my examinations on the morning of the 14th instant.

I found the work in all respects substantial and sufficient, corresponding to the specifications, except where these had been changed or modified by the direction of the engineer, as provided for in the terms of the specifications. I found complete depth of water in the channel.

In my opinion you are justifiable in reporting the work complete and acceptable.

I received courteous assistance and full explanations from Mr. Forster, and every facility for thorough examination was extended by the officers of the company. I am especially under obligations to Mr. Muloch, superintendent of the work, who made soundings, greatly facilitating the work of inspection.

I have the honor to be, very respectfully,

SAMUEL WRIGHT.

Report of J. H. Forster, State Engineer

(Rec., p. 101).

HOUGHTON, *Oct.* 18*th*, 1873.

I hereby certify that the Portage Lake and Lake Superior Ship Canal is completed according to law; that the plans and specifications approved by Governor Crapo have been substantially complied with; that the modifications made by the State Engineer in charge, and approved by Governor Baldwin and your Excellency, have been of great benefit to the works, and that the canal and breakwater, in extent and solidity, in depth of water, in width of channel ways, in length of piles and extent of sheet piling, **are much in excess of the requirements of the official specifications. I therefore accept the canal.**

Most respectfully,

JOHN H. FORSTER,
Engineer for State.

To his Excellency,
Governor JOHN J. BAGLEY,
Detroit, Michigan.

EXECUTIVE OFFICE, MICHIGAN,
LANSING, *Feb.* 12*th*, 1884.

I hereby certify that the foregoing is a true copy of the certificate of John H. Forster, engineer for the State, now on file in this office.

WILLIAM STEVENSON,
Private Secretary to the Governor of Michigan.

First Certificate of Governor of Completion of Canal (Record, p. 99).

EXECUTIVE OFFICE,
LANSING, *November* 29, 1873.

Whereas I have received the certificate of John H. Forster, engineer, duly appointed under section three of act 216 of the laws of this State for 1865, entitled "An act to accept a grant of land by act of Congress to aid in the construction of the Ship Canal and Harbor at the head of Portage Lake, to connect with Lake Superior, and to provide for the construction of the same," which certificate sets forth that the Portage Lake and Lake Superior Ship Canal Company mentioned in said act (said company being now known as the Lake Superior Ship Canal Railroad and Iron Company) has completed the canal mentioned in said act, in pursuance of the act of Congress, and in conformity with the plan and specifications;

And whereas, I have heretofore appointed CHARLES E. HOLLAND, ESQ., of Houghton, in this State, my agent to inspect said work after completion, and to determine whether said canal and harbor are constructed as required by said act, who has made a report to me upon the subject;

And whereas, I have made a personal examination of said canal and harbor, and have found the same to be constructed and completed, so far as the building of said canal and harbor is concerned by said company, as required by said act of Congress and in conformity with said plans and specifications, except that the legal title to the lands on which said canal is built is not vested in said company, but such legal title has been taken to certain persons individually who are officers of said company and that certain of said lands are subject to encumbrance, and that in respect to such title, and in consequence of said title not being in said company, the said canal and harbor are not constructed and completed in accordance with the act of Congress;

And whereas it is represented to me that measures will be taken without delay to vest the said legal title to said land in said company, and thereby to make the construction of said work complete, and it is desired

that I certify to so much as I can lawfully certify in advance thereof:

Now, therefore, I, John J. Bagley, Governor of the State of Michigan, deem it proper to certify the foregoing facts to the said Lake Superior Ship Canal, Railroad and Iron Company, to the end that they may use the same as they shall be advised may be necessary for the protection of their rights, and of the rights of all parties interested in the premises, but without prejudice to any rights or interests of the State of Michigan arising out of said land grant, and said laws dependent directly or indirectly on the condition of the title to said lands on which said canal and harbor are built, and which are to be used in connection therewith as a part of said public work; it not being my design that this shall stand as the final and absolute certificate of completion required by section four of said statute, and which final certificate will not be due until such title to the lands acquired by the said canal and harbor is made good.

In witness whereof, I have set my hand and caused the great seal of the State of Michigan to be affixed this 29th day of November, A. D. 1873.

(Signed) JNO. J. BAGLEY.

By the Governor:

Secretary of State.

Governor's Certificate of Final Completion of Canal and Acceptance (Record, p. 98).

STATE OF MICHIGAN,
EXECUTIVE OFFICE, LANSING, June 25th, 1875.

Whereas, by certain Acts of the Congress of the United States, lands were granted to the State of Michigan to aid in the construction of a ship canal and harbor from Portage Lake to Superior;

And whereas, by an Act of the Legislature of the State of Michigan, said grant of lands was subsequently accepted by said State and were granted to, and conferred upon, the Portage Lake and Lake Superior Ship Canal Company, a corporation organized under and by virtue of the laws of the State of Michigan, and whose name was afterwards changed to that of the Lake Superior Ship Canal, Railroad and Iron Company;

And whereas, I have received a certificate of the engineer duly appointed under said last-named Act certifying that said Lake Superior Ship Canal, Railroad and Iron Company has completed the said canal and harbor in conformity with the plans and specifications therefor, and in pursuance of said Acts of Congress;

And whereas, I have heretofore appointed Charles E. Holland, Esq., of Houghton, in this State, my agent to inspect said work after completion, and to determine whether said canal and harbor have been constructed as required by said act, who has duly made report to me;

And whereas, I have made a *personal examination* of said canal and harbor, and have found the same to be constructed and completed in accordance with the terms and requirements of said Acts of Congress, and said Act of the Legislature of the State of Michigan:

Now, therefore, I, John J. Bagley, Governor of the State of Michigan, do hereby determine that said canal and harbor have been constructed by said company as required by said Act of Congress, and in conformity with the plans and specifications therefor, and do accordingly hereby certify the same to said company.

In witness whereof, I have hereunto set my hand and caused the great seal of the State of Michigan to be affixed this twenty-fifth day of June, in the year of our Lord one thousand eight hundred and seventy-five.

[L. S.] JOHN J. BAGLEY.

(By the Governor.)

E. G. D. HOLDEN,
Secretary of State.

Opinion of Judge Severens on the first trial of the Cunnigham case, concurred in by Judge Sage.

The opinion of the court was delivered orally by Judge SEVERENS, at Marquette, July 24, A. D. 1889, as follows:

In this case we had substantially formed our opinion as to the conclusion which the court ought to reach in the disposition of it at the time when the proofs were put in and closed.

But, on account of the very great importance of the questions involved, and of the very large interests which were directly or indirectly at stake, we have listened with patience to all the arguments which counsel on either side desired to adduce.

The views which we had, however, at the close of the testimony, have not been substantially affected by the arguments.

I will state, in an off-hand way, for the benefit of counsel and the parties, the view which the court takes of the legal questions involved, regretting that now, at the close of the arguments, we have not time to elaborate more fully, in a written opinion, the reasoning by which the court arrives at the result which we shall indicate.

It seems to us that it is not necessary to determine what was the effect of the act or resolution of Congress providing for the exchange of these grants; or, in other words, to determine whether the Commissioner of the Land Office, standing for the United States, construed that resolution correctly or not, as meaning to impart that the intention of Congress was to require that all of the grant which had been made to the line included in the designation of the route from Marquette and Ontonagon to the State line, should be surrendered; or, whether the intention of Congress would be satisfied by a surrender by the railroad company and the State of those lands which were located along the line from Marquette to the State line; because it appears to us

that the effect of what was done by the State, and by the corporation which has succeeded to the rights of the corporations to whom this grant had been assigned, was, in the circumstances under which these acts were performed, to revest the title to those lands in the United States.

The effect of the grant by the United States to the State—I mean the original grant—and the grant by the State to the corporations upon which it conferred the land, was, to vest in those corporations the title to this land, subject, however, to the liability to be forfeited for breach of condition subsequent. The corporations, then, acquired the title to this land, subject to this liability of forfeiture. The Northwestern Railway Company ultimately acquired (without going throught the particular steps by which it was done) the title which had been acquired under these several grants to the original several corporations. While the corporation held the legal title to this land, the State undoubtedly had an interest in it—I use the term interest in a general sense and not signifying a legal estate—it had an interest in the appropriation of these lands to the purpose for which they were designed by the act of Congress. It has not a legal title. It had not a direct legal interest. But it had a sort of public or political interest in the appropriation of the lands to the proper purpose.

Now, whether the Commissioner of the Land Office was right or not in determining that the act of Congress required the surrender of this land, on both branches or parts of the line, nevertheless that was a construction which was acquesced in by the railway company, which had the substantial legal interest in the land.

The railway company, acquiescing in that construction, executed its conveyance to the State of Michigan for the purpose, and for the only purpose, of having the land surrendered by the State, and through that conduit to the United States, in compliance with the demand made by the Commissioner of the General Land Office.

In receiving this conveyance to the State from the Northwestern Railroad Company, and making the transfer to the general government, the State was a mere channel acquiring no new interest in the land by virtue of that conveyance.

It was bound by the intent and purpose of the con-

veyance from the railroad company to it to transfer the land through to the United States, so as to accomplish the purpose for which the conveyance to the State was made. This, we think, was the effect in respect to the title of the railway thus surrendered.

Now, it is true that there was no act of the Legislature which authorized the governor to convey to the United States the interest of the State in the land upon this branch or part of the line. Nevertheless, the executive department of the State, after taking advice of the proper law officer of the State, also acquiesced in the construction which had been put upon the act of Congress by the Commissioner of the Land Office, and in pursuance thereof, as the representative of the State, and for the purpose also of accomplishing the purpose of the railroad company in making the conveyance to it, executed the surrender which was demanded; and executed it on the part and behalf of the State of Michigan, as and for its compliance in the requirements of the resolution of Congress. In consequence of this surrender, a still larger grant enured to the corporation which had been intrusted by the State with the building of the railroad.

Now, it seems to the Court that the legal consequences of these transactions was to re-vest the title to this land in the United States.

But, if that were not so, we should still be of the opinion that when Congress came to make the grant in favor of the canal company, and therein provided that the land granted should be selected by some agent to be appointed by the governor of the State of Michigan, the action of that agent, thus appointed by the governor to make the selection, was intended to be the act of the State of Michigan; and that, what should be done by the agent appointed by the governor in behalf of the State of Michigan was the act of the State in making the selection of the land to be conferred upon the canal company, for the purpose of promoting the object of the grant.

An agent was appointed by the governor to represent the State in making the selection. That agent selected these lands. They were incorporated in the list. That list was returned to the governor, and was also returned to the Commissioner of the General Land Office, or to the Land Department at Washington, and and the selection was there approved.

We think it must be implied that the governor of

Michigan, in the acceptance and identification of this grant, represented the State. He appointed the agent who acted in the field for the purpose of identifying the lands and accomplishing the transfer; and it therefore follows that it was known to the executive department of the govenment of the State that this land had been selected for the purpose of identification and location, under this canal grant. The State got the benefit which was intended by Congress from this great public improvement. It got the benefit of this selection of the lands. They were given in payment of the canal company for the work which it performed. The governor's certificate shows that this work was executed. The canal company earned these lands; they paid a valuable consideration for them. We think that after having thus concurred, as it did—the only department of the State government which was charged with the duty of making this selection of the land—that, having concurred in the making of the selection of this land to be affected by this grant, the State would be estopped from afterwards affirming that it had title to the land under some earlier grant. We are therefore of the opinion, upon both grounds, that plaintiff's title must be held valid—that is to say, both upon the ground that the effect of the surrender of the railroad company and by the governor of the State was to revest the title in the United States; and that if it did, then it was undoubtedly competent to be selected under the canal grant, and also upon the other ground indicated, viz., that the State having concurred in this selection of the land, and having received them under another grant, and allowed the lands to be appropriated to the objects of another grant, could not now be heard to say that it still retained them under the former grant.

And certainly, this defendant, as it seems to us, is not in position to assert that the State, notwithstanding all this, retains the land under the former grant—seeing that he in no way connects himself with any title from the State.

Another question which was raised by one of the counsel for the defendant was, that the land, at the date of the grant in favor of the canal company, had not yet been surrendered to the United States, but were still in the railway company or in the State, and therefore could not be deemed within the grant. It appears from the evidence in the case that at the time when the selections were made, and when the selections were

ratified and confirmed by the land department, this land had been restored to the public domain.

Now, it might be (though we express no opinion upon the point), if the question were to arise in a direct proceeding for the purpose of testing the validity of that selection and appropriation, that such consequence as he contends for might follow, under the authority of the decision which he has referred to. Still, we do not think that the circumstances of the present case expose the case to the application of that doctrine, for this reason. Undoubtedly, if we are correct in the conclusion which we have already indicated upon the main branch of the case, this land had been restored to the general government prior to the time when the selection was made. Now, the selection was in fact made colorable under authority of the provisions of that grant, and the officers of the land department assented to that selection and permitted to be appropriated to this grant these lands which had thus been restored, and which, at the time of the selection, were confessedly public lands.

Now, then, at the time when that action took place by the land department, this land was public domain. It was subject to the action of the authority of the land department, by sale or other disposal; and we think that the rule which has been contended for on the part of plaintiff goes to this extent, viz., of holding that the decision of the proper officer of the department in reference to a selection or sale of any part of the public land which is then within the public domain cannot be inquired into in this collateral way.

We have intimated during the course of the argument what we should be fully prepared to hold in a case where the facts offered the application of the doctrine, *viz.*, that where the officers of the land department undertake to make some determination or disposition of land which had been previously conveyed, and which was not within the control of the department—was not at the time part of the public domain—that such action could be questioned by a defendant in ejectment—because it would be beyond the jurisdiction of the officers in the land department to make any disposition or determination about land which had been theretofore granted, and of which the United States had become divested. But it is not necessary to follow out that; it would be a mere speculation. Undoubtedly the rule is, that where the land is within the public domain,

and subject to the disposition of the land department, the action of those officers is authoritative and conclusive, except some direct proceedings be brought for the purpose of overhauling it by some one having an interest therein; so that the result would be, upon that branch of the case, that, if the land department sanctioned the selection of this land, and it was, at the time of the selection, part of the public domain, it is not important, so far as the facts of this case are involved, to determine whether it was strictly competent to have been selected under the terms of the act, not being at the time of the grant within the public domain.

It seems to the court that these suggestions cover the substantial ground of the case, and perhaps it might as well be disposed of at this time.

Gentlemen of the jury, in the view which the court takes of the law of the case, as applied to the facts exhibited by the evidence, and about which there is no controversy, the plaintiff in the case is entitled to prevail, and yet you are directed to return your verdict accordingly.

OPINION OF JUDGE GRANT.

STATE OF MICHIGAN—CIRCUIT COURT FOR THE COUNTY OF MARQUETTE, 1888.

JESSE SPAULDING ET AL.

vs.

JAMES MURPHY.

Before Hon. Claudius B. Grant, Circuit Judge (now Mr. Justice Grant, of the Supreme Court of Michigan).

GENTLEMEN OF THE JURY—This is an action of ejectment brought by the plaintiffs, Jesse Spaulding and others, against James Murphy, to recover the possession of certain lands described in the declaration in the case.

The plaintiffs derived their title from the United States government. On January 20th, 1872, the plaint-

iff, Jesse Spaulding, obtained a certificate from the proper authorities of the United States government conveying to him the land in question. The certificate was issued by the receiver of the United States Land Office at Marquette. Subsequently he sold an undivided interest in these lands to the other plaintiffs in the case. The plaintiffs, therefore, have obtained their title direct from the United States government.

The defendant was found in the possession of this land, and therefore suit was brought against him to recover the possession for the plaintiffs.

The defendant has no title. It appears from the evidence in the case that he applied to the land office at Marquette on the 27th day of Septemper, 1882, to pre-empt this land under the laws of the United States government.

His application was rejected, because the land had been sold by the government to Jesse Spaulding, and defendant was notified of that fact. Notwithstanding this, he entered upon the land in question, and was in possession of it at the time this suit was brought. Witness Oliver testifies that when he served the declaration in this case upon him, the defendant claimed that he was in possession and held it as a homestead; I suppose he meant that he was in possession, or claimed possession, under his application to pre-empt the land. So far, then, as the defendant in this case in concerned, he stands here as a trespasser without any title whatever, the claimed owner of the land, which was the United States government formerly, disclaiming any right to give him any title and refusing to convey him any title, and giving him the reason therefor, viz.: That the government had parted with all the title it had to the plaintiffs in the case.

But the defendant defends on the ground that the plaintiff's title is defective, it being the usual rule that a plaintiff in ejectment must recover upon the strength of his own title, which is true.

It is alleged that Congress, under the act of June 3, 1856, made a grant of this land to the State of Michigan, to aid in the construction of certain railroads, and that the proceedings on the part of the State to relinquish and surrender these lands back to the United States government were not in accordance with law, and are, therefore, void.

It is not necessary, gentlemen, for the purposes of this case, to discuss or decide this question; both of these

parties, so far as appears here, claim from the United States government. If the defendant's position is correct, his position is as fatal to *his* claim as it is to the claim of the plaintiffs. They both claim from the same grantor. The defendant claims that the government had not title to the lands, and that he is entitled, by some process or other, now to receive a title from the government. The plaintiffs also claim from the government. Under the defendant's own claim, he has no right whatever; while the plaintiffs at least have a color of title—all the title at least which the government had at the time this certificate was issued.

But the proceedings between the United States government and the State authorities cannot be inquired into in this form of action.

After this grant of lands by the United States government to the State, for the purpose of constructing this railroad, various proceedings wern taken on the part of the United States and on the part of some railroads interested in this grant of lands, for the surrender of this grant back to the United States government. This land is in what are known as the common limits, and it is claimed on behalf of the plaintiffs in this case that that surrender to the United States government was valid. It is claimed on the part of the defendant that it was not valid.

From the examination which I have given of the case, I am satisfied that some of the proceedings are according to law, while some of the proceedings in regard to the surrender are doubtful. But the authorities of the two governments, the United States government and the State government, have for many years treated this land as relinquished and surrendered. And the United States government has sold them and issued patents and certificates therefor, and received the money from those who bought them.

Now, gentlemen, it is clear to my mind that the question sought to be tried here cannot be involved in this proceeding. A patent of the United States government cannot be set aside in a collateral proceeding of this character. There must be a direct proceeding brought for the purpose of testing the title of the parties; that is, where a subsequent patent has been issued to anyone, the first patent will prevail, in a suit at law, until it has been set aside by proper proceedings directly attacking it. It is sought here to attack these patents or certificates collaterally, and that, in my judgment, can-

not be done. When the United States government has given a title, that title stands until it has been set aside by some proceeding brought directly for that purpose.

This is decided in a leading case in this State, *Bruckner's Lessee vs. Lawrence*, 1st Doug., Mich., on page 19 (where the cases in the S. Court U. S. are cited).

Applying the principles laid down there to this case, we find that the plaintiffs have a title direct from the United States government. We find that the defendant has no title whatever. So far as this case is concerned, he entered upon these lands without any authority of law or right; so that it is clear to my mind that before he or any one else can bring a suit at law to recover the possession of this land, they must first bring some proceeding on the chancery side of the proper court to set aside the plaintiff's title.

I therefore charge you, gentlemen, to find a verdict for the plaintiffs.

Act of Congress Confirming State Selections.

ACT OF MARCH 2, 1889 (25 STATS. 1008).

CHAP. 414.—AN ACT to forfeit lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon in said State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto all lands heretofore granted to the State of Michigan by virtue of an act entitled, "An Act making a grant of alternate sections of the public lands to the State of Michigan, to aid in the construction of certain railroads in said State and for other purposes," which took effect June third, eighteen hundred and fifty-six, which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain: Provided, that this act shall not be construed as forfeiting the right of way or depot grounds of any railroad company heretofore granted: And provided, further, that nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title.

SEC. 2. That nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of any railroad hereinbefore mentioned under any Act of Congress making a grant of public lands in the State of Michigan: Provided, that such lands lie opposite such

constructed road, or if indemnity lands are provided in such grants the same shall be selected from the public lands within such indemnity limits lying nearest to such constructed road: and provided, further, that this act shall not be construed to prejudice any right of the Portage Lake Canal Company, or the Ontonagon and Brule River Railroad Company, or any person claiming under them; to apply hereafter to the Courts or to Congress for any legal or equitable relief to which they may now be entitled, nor to prejudice any right of forfeiture, as hereby declared, or recovery of the United States in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies or their assigns, under the laws of the United States.

SEC. 3. That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, under color of the public-land laws, where the consideration received therefor is still retained by the Government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: Provided, however, that where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were *bona fide* pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

SEC. 4. That no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to

waive or release in any way any right of the United States now existing to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line.

SEC. 5. That all persons who may have settled upon and are now in possession of any of the lands hereby forfeited, and who may desire to enter the same under the homestead law, shall be allowed, when making final proof, for the time they have already resided upon and cultivated the same.

Approved March 2, 1889.

Opinions of SEVERENS and SAGE, JJ., Filed July 8, 1892.

UNITED STATES OF AMERICA.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN—NORTHERN DIVISION.

THE UNITED STATES OF AMERICA vs. THE LAKE SUPERIOR CANAL AND IRON COMPANY ET AL.	Before SEVERENS and SAGE, JJ.

OPINION OF JUDGE SEVERENS (FILED JULY 8, 1892).

We have already intimated our views with respect to the propriety of filing such a bill, but in such cases we think it is competent for the United States to file its bill where the title to the property remains in itself, and where private individuals under the homestead and pre-emption laws have acquired rights under the statutes. Indeed, there seems to be no other way in which relief can be obtained except upon a bill filed by the United States, and we think that what was declared in the case of United States vs. Beebe, in the 127th Supreme Court Reports, is sufficient warrant for the conclusion which we reach in that regard.

Now it may be the allegations in the bill are not sufficiently specific and full to show to what particular lands the private individuals claim rights, in whose behalf the Government files this bill. It is not necessary for the Court to express at this time any positive opinion on that subject, although speaking for myself alone I may say that I incline to the view that the bill ought to set forth the particular descriptions of land which are in such a plight as would authorize the Government to file such a bill for the purpose of protection. If this suggestion is well founded, the diffi-

culty can be cured by an amendment, which in a case of such importance as this, we should feel inclined to allow for the purpose of bringing the real case upon the record.

Now, then, as to the main question, which has been argued. We do not propose to go back to moot the question which was settled by the opinion of the Circuit Judge, in respect to the surrender to the Government by the State of these lands, but we treat that as finally settled.

In the opinion, which was written by the Circuit Judge, in respect to that matter, it was stated at the close that there would remain open for contestation between the parties to this suit the question whether the confirmatory Act of March 2d, 1889, did or did not confirm the title of the canal company to these lands; that was felt at the time to be a question of doubt and difficulty by the Circuit Judge, and, as he stated at the close of his opinion, the question was such that a new trial should be awarded for the purpose of allowing that question to be presented and determined, and it was for that purpose that such a trial was had. Upon that trial, as the counsel remember, the Judges who are now present [SEVERENS and SAGE, JJ.] were in doubt, and differed upon the consideration of the construction of the statute. In my opinion, if it had not been for the proviso to Section 2, there would be no doubt but that the effect of the provision in Section 3 was to confirm to the canal company the lands which had come to it *de facto* through these State selections, because it was manifest that the object of this section, as well as of other provisions of the act, was to cure matters that might be defective on account of some irregularity.

It can hardly be supposed that Congress would pass an express provision to cover a case where there was no legal doubt in regard to the transaction, but it was probable that Congress passed this act to cure defective transactions in respect to the selection or purchase of the lands where what had been done had been done *bona fide*; and precisely such a case as this State selection to the State of Michigan for this canal company was open to the language and to the policy, so far as the Court can see, of this provision in Section 3 relating to State selections.

At the close of that section is a proviso which was evidently incorporated for the purpose of putting a

limitation upon the general language of confirmation contained in the prior part of Section 3 of State selections and in favor of a class which Congress intended to give special protection, namely, to homesteaders and pre-emptioners who had entered in good faith upon these lands prior to the date named in the proviso. So that, with the limitations put upon the general language of Section 3 in respect to State selections by this last proviso in the section—subject to that—my opinion would have been, and always has been but for the proviso at the end of Section 2, that this State selection was confirmed by this act and inured to the benefit of the canal company. The Government had received precisely the consideration upon which the grant was made. the canal had been built, and it had been determined by the final source of adjudication on that subject, namely, the Governor of the State, that the canal had been built, and all that the Government ever expected to get through this grant had been accomplished and the final certificate granted, although even that might have been faulty, the Government had received the consideration which it had expected to get from the grant.

This would have been my construction of this act but for the provision of Section 2 relating in terms to the Portage Lake Canal Company. Acting upon the principle of construction that was referred to, I felt that it was doubtful that Section 3 could be given the effect claimed for it, and entertaining that doubt—and I think it was a doubt also entertained by my associate [SAGE, J.] —we gave effect to the expression of that doubt by holding against the confirmation of the title by the third section (Record in No. 305, in Cunningham Case, pp. 186, 187).

But further consideration and attention to the history of this act as it went through Congress, and its progress in the very different form in which the act was finally passed, and viewing the record and the provisions in this act, I may say, speaking for myself, that my doubt is removed. I cannot think that Congress intended by this proviso in Section 2 to limit the operation of the confirmation expressly contained in Section 3 to lands which had been taken under color of law and by State selection in Michigan, but I think the largest effect that can be given to this general language that is contained in this act, that nothing can be construed to prejudice any right of the canal com-

pany or the Ontonagon and Brule River Railroad Company or any other person to apply to Congress or to the Courts, etc., that the largest effect that can be given to this is to forbid the extension by implication of specific grants or provisions contained in the act; that the most that could be inferred from these provisions would be that the respective provisions should be limited to what their plain language and a fair interpretation of them would warrant.

Now then, we do not reach the end of the difficulty as it is presented upon the case exhibited to us by going thus far. It is obvious from what has already transpired in this litigation that it is a question of doubt, it is a question of difficulty; it was stated in the opinion of the Circuit Judge when the Cunningham case was before him, and our own status with reference to this case, and our decision at Marquette (in cases Nos. 305, 306, 307) shows that it was a question of difficulty. What then ought the Court to do under such circumstances?

These lands are lands which, under the laws of the United States, belonged to the United States and were restored by this act of forfeiture to be open to be settled upon by homesteaders and pre-emptioners, and they have a special value on account of the timber that is upon them, and the homesteaders and pre-emptioners may be affected by the circumstance that they are timber lands. There is a class of cases where it has been held that where the rights of the parties were doubtful, or where the opinion of the Court might be hurtful to the party sought to be restrained, or where the effect of the withholding of the injunction would be to permit the subject matter to slip out of the hands of the Court, that the Court ought to hold the property in *statu quo*. to the end that, when the final decree comes to be made, it might have within its grasp the object upon which to impress the decree.

That consideration has considerable force with me, notwithstanding my opinion upon the proper construction of this act, in reference to which I may say I rather expect, as I have already intimated, that the opinion of the Supreme Court will reverse what we have done in respect to that confirming act; and if there were no prospect of reaching the decision of any test case until these ejectment cases that are in the Supreme Court could be reached in the ordinary course, which means a delay of five years, I should

hesitate very much about granting an injunction to tie up this property so long. It may be and very likely is exposed to some perils, and I suppose it is exposed to the action of the elements as such land is; but, as counsel are aware, there is a prospect that—perhaps already, at least within a few days—a bill may be passed which may create an intermediate court, an appellate court, as provided in that bill, whereby the granting of an injunction is a matter for an appeal, an interlocutory injunction to be heard at any time within thirty days, and, by the provisions of the act, such cases are given precedence as to other business.

If that court should be speedily organized, we might conclude to award this injunction and let the parties appeal the whole case to the appellate court.

For the present, until we see what this may result in, to give us a little time to consider the questions, not to permit the timber to be cut off and the subject matter of the suit to be taken out of reach; I say, upon these reasons, we shall reserve the determination of the case for the present, for a few days.

MR. PALMER, District Attorney,
For the United States.
JOHN F. DILLON,
D. H. BALL,
For the Defendants.

THE UNITED STATES OF AMERICA, Western District of Michigan, } ss.: SOUTHERN DIVISION.

I, CHARLES L. FITCH, Clerk of the Circuit Court of the United States for the Western District of Michigan, do hereby certify that the foregoing is a true and compared copy of the oral opinion of Judge SEVERENS, as reported filed July 8, 1892, in the proceedings of said Court in said entitled cause, and of the whole thereof.

Witness my official signature and the seal of said Court, at Grand Rapids, this 24th day of February, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.]

CHARLES L. FITCH,
Clerk.

UNITED STATES OF AMERICA.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN—NORTHERN DIVISION.

THE UNITED STATES OF AMERICA vs. THE LAKE SUPERIOR CANAL AND IRON COMPANY ET AL.	Before SEVERENS and SAGE, JJ.

CONCURRING OPINION OF JUDGE SAGE (FILED JULY 8, 1892).

I felt at Marquette the embarrassment of being called upon to decide questions that were argued before the Circuit Judge, which I felt by the decision which he had made: not that I was under the conviction that his decision compelled me to follow it in all respects, but, under the circumstances, that considerations of propriety and comity called upon me to regard it. If we were all three (my brother, the Circuit Judge and myself) sitting upon the bench and hearing this cause, his opinion would control against that of both of us; so that, I thought that I was not morally at liberty to disregard the rulings that he had made, and I still feel so, although I concur with my brother in the views which he has expressed in regard to this case, and although I do not regard the decision of the Circuit Judge as altogether foreclosing that question, because the force and effect of the confirmatory provisions of this act were left open by him. But I do not know of any better established rule in reference to preliminary injunctions than that a probable right is sufficient to justify the granting of them, more particularly where the withholding might, and probably would, result in irreparable injury, and render the granting of the final relief, prayed for by the complainant, practically impossible: that the Court properly will, where the ob-

ject of the application is to prevent injury to property pending litigation, grant a restraining order to prevent waste or destruction of the subject matter in litigation, while that is pending.

Now, as I understand the situation of the matter in Congress, the bill for the establishment of an Intermediate Court, awaits only the signature of the President, which will undoubtedly be given, because some such measure was recommended by him. In the second section of the bill as it passed the Senate, which is said to be substantially the form in which it finally passed Congress, it is provided, that from any order granting an interlocutory injunction an appeal may be taken, pending action, and within thirty days from the granting of the order, to the Appellate Circuit Court, and that that Court shall give precedence to the hearing of that appeal. Meantime, the Court here below may, in its discretion, stay all proceedings, pending the appeal; therefore, it seemed better to me that this decision should be withheld, in the meantime a temporary restraining order to issue and continue in force until the disposition of this motion. In other words, make a temporary restraining order to cover the questions in the stipulation made by counsel. Then we would know, as we shall in a few days, something more about the Intermediate Court, and disposition of this cause can be made so as to take it at once to that Court and open the matter fully for discussion. There would be no question about the conclusiveness of the decision heretofore made by the Circuit Judge, and no doubt the entire matter will be left for consideration and disposition by the Court; and it seemed to me that that would be the most beneficial course for the promotion of the interests of all parties concerned in this litigation, and be promotive of a speedier settlement of it. I have no idea that this cause will be advanced upon the calendar of the Supreme Court of the United States. I am certainly not wrong in the statement that that Court has repeatedly refused to advance cases in which the interests were larger and just as pressing as in this case. The Court is three years behind, and is properly very much indisposed to still further delay the old cases on the docket to make way for later cases because of the importunity of counsel, and when we shall dispose of this case so as to send it to the intermediate Court, the whole case can be considered and disposed of, so as possibly to put an end

to the litigation. Now, our decision would necessarily, if that should be the final view which we would take of the matter, be to grant the injunction because there is no appeal from an order refusing; it is only from an order granting an interlocutory injunction.

There may have been some other amendments in the conference committee, but as we looked at it, from the meager reports we have, the bill seems to have passed as it was passed by the Senate.

MR. PALMER,
District Attorney, for the United States.
JOHN F. DILLON,
D. H. BALL,
For the Defendants.

THE UNITED STATES OF AMERICA, } ss.: SOUTHERN
Western District of Michigan, } DIVISION.

I, CHARLES L. FITCH, Clerk of the Circuit Court of the United States for the Western District of Michigan, do hereby certify that the foregoing is a true and compared copy of the oral opinion of Judge SAGE as reported, filed July 8, 1892, in the proceedings of said Court in said entitled cause and of the whole thereof.

Witness my official signature and the seal of said Court at Grand Rapids, this 24th day of February, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.]

CHARLES L. FITCH,
Clerk.

By Deputy.

[redacted]

[redacted]

[redacted]

PREFATORY NOTE.

The first trial of the Cunningham case, in 1889, before SEVERENS and SAGE, JJ., resulted in a verdict in favor of the plaintiff (Record, Cunningham case, p. 11). The opinion of SEVERENS and SAGE, JJ., on this trial, delivered July 24, 1889, is reprinted at large in the appendix to our main brief filed in this Court at page 155. The defendant Cunningham moved for a new trial, which was heard before JACKSON, BROWN and SEVERENS, JJ. The opinion of JACKSON, Circuit Judge, in favor of a new trial, is found in the Cunningham record, pages 12–26; the opinion of BROWN, J., in the same record, pages 26–32; the opinion of SEVERENS, J., dissenting, in the same record, pages 32–37.

On the first trial no question was agitated or decided in reference to the act of March 2, 1889; accordingly, the Judges did not pass on it in deciding the motion for a new trial, but expressly reserved it (see Judge JACKSON's opinion, Cunningham Record, pp. 25, 26).

The land in the Cunningham case was situated within the "clear limits" of the Ontonagon Branch Railroad grant. So, also, the land in the Finan case. The land in the Donahue case, however, was in the "common limits" of the Ontonagon and Marquette branches. No question as to the common limits land was or could be decided in the Cunningham case. The second trial of the Cunningham case was had July 23

1890 (Record, p. 43), the Finan and Donahue cases being tried at the same time. At that trial the question as to the effect of the canal certification of May 19, 1871, as applicable to the Cunningham case, was precluded by the opinion of the Circuit Judge. There was left, therefore, for argument on that trial, as to the clear limits lands, only the question of the confirmatory effect of the Act of March 2, 1889. The question of the plaintiff's title was open in its whole extent in the Donahue case, relating to lands in the common limits, which was not embraced in any question passed upon by JACKSON, J., in the Cunningham case.

After the testimony was taken, which now appears in the Record, Mr. JOHN F. DILLON, of counsel for the plaintiff, delivered an argument in support of the plaintiff's title, which was stenographically reported. This argument relates mainly to the common limits land and to the Act of March 2, 1889. It is now reprinted, with references to the records in this Court, and submitted in favor of the title and rights of the Lake Superior Ship Canal Railway and Iron Company in each of the three cases above entitled.

ORAL ARGUMENT

OF

JOHN F. DILLON

BEFORE SEVERENS AND SAGE, JJ., AT MARQUETTE, JULY 23, 1890 (STENOGRAPHICALLY REPORTED), AND NOW SUBMITTED TO THE SUPREME COURT IN BEHALF OF THE TITLE OF THE CANAL COMPANY.

[In this Argument the references to the record, unless otherwise stated, are to the printed record in the CUNNINGHAM case.]

THE PLAINTIFF must recover on the strength of its own title. Now, then, *if your Honors please*, what is the title of this plaintiff? It is two-fold, and each must be considered separately. First, under the Act of July 3, 1866, and, second, under the Confirmatory Act of March 2, 1889.

The first title which we claim, is one arising under a certification, (the equal equivalent of a patent,) made by the Secretary of the Interior to the State, for the benefit of the old canal company, approved by the Secretary of the Interior on the 22d day of May, 1871 (text of said Certificate, Record, pp. 43-45). I have heard a good many heresies, as I regard them, in the course of this argument, and among others,

the extraordinary statement of my learned friend, Mr. Dickinson, that a patent from the United States—I think I understood him right—is not even *prima facie* evidence of title in the patentee or his assignee, unless the plaintiff goes further, and by extrinsic testimony shows that the lands named in that patent belonged to the Government that assumed to issue it. Now, then, I want to call your Honor's attention to this certificate or patent. I am now addressing myself to the questions that more particularly arise in the case against Donahoe, in which the *locus in quo* is in the "common limits."

The Canal Grants of March 3, 1865, and July 3, 1866, and the Action Taken Thereunder.

March 3, 1865, pursuant to the memorial of the State Legislature, the Congress of the United States made a grant of 200,000 acres of lands to the State of Michigan to construct a ship canal (see text of that Act in our main brief, p. 3). That was a grant, not of land "in place," and that is a very material consideration, and more material, because on looking at Judge JACKSON'S opinion (Record, pp. 12-26) from beginning to end the difference between the powers and jurisdiction of the Secretary of the Interior in respect of lands in place, and his power and jurisdiction conferred by this Act of 1865, and the further Act of July 3, 1866, and the Joint Resolution of July 5, 1862, is not adverted to. The Act of July 3, 1866 (text thereof, see our main brief, pp. 7, 8), made an additional grant of 200,000 acres of land, and it is under that grant that we derive title to the lands now in dispute in these actions.

Canal Grant of March 3, 1865.

The Act of March 3, 1865, granted 200,000 acres of land that were to be selected—mark the word "selected"—"to be selected in subdivisions agreeably to the United States Survey by an agent or agents appointed by the Governor of the State, subject to the approval of the Secretary of the Interior." What difference does it make that the Governor saw fit to appoint the president of the company on which the State had conferred the grant, to make these selections. The company was the beneficial grantee,—so expressly stated in the Act of July 3, 1866,—and the grant of Congress is that the agent appointed by the Governor may select from any lands in the Upper Peninsula subject to private entry. And such was the universal practice, and it is open to no criticism and no objection. When this grant was made conferring upon the grantee, the State of Michigan, the right to make the selections from any lands of the designated quality or character, the State conferred them upon a corporation which it appointed to do the work, and the only consideration in this case—and I ask your Honors to notice it—the only consideration that the canal company got, or was to get, or by any posibility could get, for its extensive outlays on the construction and completion of the canal, were these granted lands. Why should the canal company not have a voice in the selection? At all events, it is enough to say that the Governor appointed an agent—and I beg to say now, lest I may forget it when I come to the Act of July 3, 1866, that the United States, in these railroad and canal land grants, deals with the Governor in various respects as the representative of the State. Now, under this act, the Governor was to appoint an agent

to select the lands, for they were to be selected, in contemplation of the act of Congress, by the State for itself; therefore, Congress said, in its bounty to the State: "Your Governor may select the lands."

"To be selected by an agent or agents, appointed by the Governor of said State, subject to the approval of the Secretary of the Interior, from any lands in the Upper Peninsula, subject to private entry."

The third section of the act provided, that the lands granted shall be subject to the disposal of the Legislature of the State, or, if it is not in session, then to be subject to the disposal of the Governor and the Board of Control, for the purpose aforesaid, and for no other.

The Legislature of Michigan accepted that grant March 18, 1865, and it added, "that none of the lands shall be sold, or otherwise disposed of, *except for the purpose of hypothecation*, until the canal shall be completed and accepted" (Sec. 2). [Text of said Act, see our main brief, p. 5.]

Inasmuch as that Act of the Michigan Legislature is by adoption made a part of the additional Act of Congress of July 3, 1866, for the benefit of this canal company, to which I shall next refer, it is for that reason important to notice it.

Congress assented, in the act under which we claim title in this action, viz., the Act of July 3, 1866, to these provisions in ths Act of March 18, 1865, of the Michigan Legislature accepting this grant.

The second section of this Michigan Act of March 18, 1865, provides:

"For the purpose of carrying out the object of said act, the said lands are hereby granted and conferred upon the Portage Lake and Lake Superior Ship Canal Company, subject to all the conditions, restrictions and obligations herein mentioned, *and that they shall not*

dispose of the same, except for the purpose of hypothecation, until the said canal should be completed and accepted" by the Governor.

There was no limitation in this Canal Act, as there is in the Railroad Act, upon the power of the State to dispose of these lands. The power conferred is broad and unqualified. They are subject to the disposal of the Legislature, or, if it is adjourned, to the Board of Control, except they shall not be disposed of for any other purpose than to build the canal. For the purpose of carrying out the object of the said act, the said lands are hereby granted and conferred *in præsenti.* " But you shall not dispose of them except for the purpose of hypothecation until the canal is completed."

The plans of the work and its execution are all left to the State, and the State goes on and appoints its own Commissioner, who is to make the plans, and survey and locate the route. The canal company had nothing to do with fixing the route of the canal or the plan of construction. It was done by the State under the direction of its own officers.

Now then, what is the provision in the Act of March 18, 1865, as regards the completion of the work? The act is very carefully framed. When the company reports the canal to be completed it is made the duty of the engineer to certify to the Governor that it is completed; whereupon, it shall be the duty of the Governor to inspect the work in person, or to appoint one or more agents to inspect the same, and determine whether such canal and harbor are constructed as required by the act; and whenever the Governor shall determine that the said canal and harbor have been constructed in conformity with the act, he is to certify the same to the company, and deposit

a copy thereof in the office of the Secretary of State and another copy in the office of the Register of Deeds of Houghton County (the county where this canal is situated), under the seal of the State, and a certified copy made by said Register is declared evidence of the facts therein set forth; and when the Governor shall make such certificate and deliver the same to the company, then what? The said company, so the Act of Michigan provides, shall stand seized and possessed of the lands hereby conferred upon it in the second section, as fully as the State can convey the same, free of any taxes for four years, if so long held by the company; and the said company shall, after having received such certificate, have the power to sell and dispose of the said lands as the absolute owner thereof.

Was the canal completed? Never, so far as my observation has extended, was more care taken; and I submit to your Honors' fair judgment that the criticism and charges of the learned counsel in respect to this canal were wholly out of place—out of place in this action, and out of place because they are not justified, even if they were pertinent, by the facts in this record.

Completion of the Canal.

The company claimed, in 1873, that it had completed the canal—not this plaintiff, the predecessor company—and the State Engineer, a most respectable gentleman —Mr. Charles E. Holland—certified to the Governor in a communication, which is in evidence, that, not wishing to rely on his own judgment, he took Mr. Samuel Wright, whom he commends as an engineer, and he says he has given his judgment more weight than his own, and Mr. Holland then adds: "I find, also, that

the work in many respects is better than the specifications."

THE COURT: Well, the Governor's certificate is conclusive of it to this Court.

JUDGE DILLON: Yes, your Honor, I ought not to waste any more time on that.*

The History of the Canal Grant of July 3, 1866, under which the Lands in Question in these Suits were Selected and Approved and Certified to the State for the Benefit of the Canal Company.

I will now briefly advert to the Act of July 3, 1866, whereby 200,000 additional acres was granted, 150,000 to be selected (not a grant, in place, but a float, like the Act of 1865, and referring to the Act of 1865 as to the mode of "selection;" that is, by the agent of the State, and such selections to be approved by the Secretary of the Interior), from the odd-numbered sections, and 50,000 acres from the even-numbered sections, which grant it is enacted shall inure to the benefit of the Lake Superior Ship Canal Company in accordance with the Act of the Legislature of Michigan (March 18, 1865) which I have already referred to. So that Congress puts its seal of approval upon that State legislation and says when the Legislature has said in its act "we confer these lands upon the canal company," and furthermore says when the Governor has certified—which certification your Honor has just

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* See appendix to our main brief (pp. 152, 153) for text of the various certificates of the completion of the canal.

stated is conclusive—to the completion of this canal that a complete title to this land vests in the canal company, Congress, says "yes" to that. Now, all that has been done, your Honors.

Observe in this act, because counsel makes a point upon it, that it drops the words "public" lands as descriptive of the lands which were granted in the act of 1865. It drops the word "public" as descriptive of the lands granted, and it drops the words "nearest to the location of the canal"—the last 50,000 acres to be selected from the *even* sections—and it provides that the grant shall inure to the benefit of the canal company by name, in accordance with the provisions of that Act of the Legislature. But even that is not so material as it would otherwise be, because on the 27th day of March, 1867, this Act of 1866, with all of its conditions, is expressly accepted by the State of Michigan [text thereof, see our main brief, p. 9].

Here let me trace briefly the history of these canal grants of 1865 and 1866. Exercising the power to mortgage, given by the Act of the Legislature, ratified by Congress, the old canal company (the predecessor company of the plaintiff company) made, first in 1865, a mortgage for $500,000; in 1868, a mortgage for $1,000,000; in July, 1870, a mortgage for another $1,000,000—for a little more, but $1,000,000 was actually decreed by the Court to be outstanding. In May, 1871, another mortgage for $1,300,000; and, while these mortgages were being foreclosed in this Court, Receivers' certificates were put out, first for $500,000, and then for $138,000. *All of which moneys were actually expended to complete the canal.* That decree found that all of those bonds were held by *bona fide* holders for value, and were outstanding. $4,500,-

000, represented by securities which the Court decrees to be actually outstanding in the hands of *bona fide* holders, and it renders its decree of foreclosure accordingly; and in that decree, this canal and every acre of this 400,000 acres under these two grants, which had previously to the decree been certified to the State, were sold, and the holders of Receivers' certificates, and the holders of these three or four millions of bonds in good faith, whose money went into the construction of that canal, became the purchasers, and they, having become the purchasers, sold the canal and these lands to the present plaintiff (text of Decrees, see Record, pp. 65–91). The present plaintiff is, therefore, not only a purchaser for value, but holds title under purchasers for value.

Now, then, if your Honors please, when you come to the Confirmatory Act of March 2, 1889; when it speaks of the confirmation of title, where the consideration has been received, and is retained by the United States, and when you come to consider equities; when you try to put yourselves, as nearly as you are able, in the position of Congress, which was legislating, and see this transaction through the media in which they saw it; when you consider that when Congress said, "We will give you 400,000 acres of land as the sole consideration for the construction and completion of a canal which shall be free for Government use for all time to come;" when neither the United States nor the State of Michigan have ever paid a cent toward the construction of that canal, except these granted lands, and when the owners of this property, to-day, succeeding to the rights of the *bona fide* mortgagees, under a mortgage authorized alike by the Legislature of Michigan and by the Congress of the United States, and that if, with-

out making any other provision for any other compensation, these lands are taken from us,—when you consider all this, will you impute the shocking injustice and intention on the part of the Congress of the United States, which ought to stand, as I believe your Honor has said in one of your opinions, in a passage of striking force, ought to stand as the embodiment of justice and of conscience,—will you hold that Congress of the United States meant to say, " We will not give any compensation to this company, or to these parties whose money has done this ; we will take away that which they supposed they had got, and we will make no other provision for them, and give the lands to these defendants who went, on these lands with full knowledge of all these rights."

Legal Validity and Effect of the Certification of these Lands by the Secretary of the Interior.

If your Honors please, I want to read one or two sentences from our patent, that embraces every one of the three tracts now in controversy in these suits—I refer to this supplemental list No. 4.* What does the Secretary of the Interior declare and state here? This grant had no defined location ; hence, being a float, a grant of quantity, not a grant of lands in place, the act of Congress necessarily contained some machinery for the purpose of giving definition to it and to carry it into effect. The lands to satisfy the grant were to be selected by the State, but that selection was to be submitted to the judgment and the determination of

* Copy, see Record in Cunningham Case, pp. 44, 45.

the Secretary of the Interior. Now, what does he say? What does he decide?

"SUPPLEMENTAL LIST of lands selected by the agent of the State of Michigan in the district of lands subject to sale at Marquette, *and granted to the State of Michigan by Act of Congress, approved the third day of July, 1886*," &c. (Record, p. 44) [first adjudication]. "*Being lands granted*," *and* "*being the vacant and unappropriated lands, designated by odd numbered sections, nearest the location of said canal*" [second adjudication].

It is dated May 19, 1871, approved by the Secretary of the Interior, May 22, 1871 (Record, p. 45).

Here are two adjudications: First, that the lands therein set out are the lands granted in that act; second, that they are vacant and unappropriated lands nearest the canal. Then the certificate:

"This is a true and correct list of tracts of lands granted to the State of Michigan, and lands designated by odd numbers, not otherwise appropriated," &c. (Record, pp. 44, 45).

that is true, your Honors (and that was approved by the Secretary of the Interior), if that is true, we have a complete and perfect title, of course.

Now, just to make my point, for I may come back to it when I get into the discussion of the railroad complication, I beg your Honors to notice the significance of the word "SELECTION" as here used, and its construction in the case of the St. Paul and Winona Railroad, 112 U. S., 720, 730.

In the canal grant under consideration, the 200,000 acres were to be "selected" by the agent appointed by the Governor, *and approved by the Secretary of the Interior*. The duty of approving the selections is not ministerial, but involves inquiry, examination and judgment, and is therefore judicial in its nature.

It is precisely the same, if the Court please, as the duty of the Governor when he was invested with power to determine whether the said canal had been constructed and completed by the said company as required by the Act of Congress. It was made the duty of the Secretary of the Interior to determine what lands should be taken to fill the canal grant, and who more properly could perform it than the head of the land department, a great and responsible officer? It was made his duty by this legislation to determine whether all the lands selected to fill the grant were lands which fell within the class of lands granted by the act.

Jurisdiction is the power to decide and determine, and the Secretary of the Interior had, therefore, jurisdiction to issue the said certificate of May 19, 1871.

I am not here to maintain that if the Secretary of the Interior should, in the exercise of this power and jurisdiction, determine and certify lands to the State which had been previously appropriated, that his act would bind the Government of the United States so as to leave it remediless. Not at all; for it would be competent for the United States to go into a court of equity if it deems itself injured, as has been held time and time again, to avoid that act; but it is not obliged to do it. The determination of the Secretary of the Interior in the exercise of this jurisdiction, if he mistakes the law or the facts, is *voidable*, not *void*. And when the Government does go into a court of equity, and into its own courts to avoid its own grant, it goes just like any other suitor—with no prerogative. It must go in with a meritorious case; and the number of times it has failed in the Supreme Court of the United States, when it

attempts to avoid patents on technicalities, don't give much encouragement for gentlemen to pursue in this case that line of attack.

This Act of July 3, 1866, as well as Secs. 1, 3, 4 and 5 of the Joint Resolution of July 5, 1862, which I shall notice futher on, makes the Secretary of the Interior the special officer or tribunal to determine what lands are vacant and unappropriated, and what lands have been granted, and are subject to selection under that act. I took down yesterday, in Mr. Ball's office, a few volumes of "Land Reports." I found in the eight volumes I examined five or six cases of similar relinquishments by other companies, and of the railroads in this State, of lands to the Government of the United States, which had been erroneously certified, or for some reason surrendered back to the United States. Not a new thing. This is not a case, as his Honor Judge JACKSON seems, in his learned opinion, to suppose, where this plaintiff is contending for any such doctrine, as that it is competent for an official of the United States to bind it, when that official goes beyond his jurisdiction, nor is it a case where we are urging that the Government can be estopped the same as an individual, merely because of certain unauthorized representations or acts of its officials. Not at all. I will make this very clear when I come to the discussion of the Joint Resolution of July 5, 1862. If your Honors will keep in mind the principles which have been settled by the Supreme Court of the United States, I think you will have no doubt in the world that it was competent for the Secretary of the Interior to determine, as a mixed matter of law and fact, whether the construction and effect of that act, the construction and effect of the relin-

quishments under the Joint Resolution of July 5, 1862, of the lands by the companies to the State, and by the State to the United States, whether all this had the effect to make these lands, within the language of the Canal Granting Act of July 3, 1866, and the Joint Resolution of July 5, 1862, lands of the United States.

The true principle is very clear. If the Secretary of the Interior goes beyond his jurisdiction; if he issues a patent, as the Supreme Court of the United States in one case puts it, for lands that had been sold fifty or a hundred years ago in Massachusetts, his action is void.

I see great stress is put by the defendants upon the case of Doolan vs. Carr, and I have accordingly carefully examined it. I don't suppose your Honors know what is implied in the expression, but that is the "trump card" on the other side. That case arose under a grant to the Central Pacific Railroad Company of California, which is, as I happen to know, and as an inspection of the Act of Congress will show, a grant without idemnity limits; where the Land Department undertook to patent lands which had been ceded by the Government of Mexico before we conquered that country, and which were actually in litigation at the time in the courts of the United States, and actually confirmed then or soon after. And they said in that case that anybody having valid rights could show the facts and the consequent invalidity of the patent. Now that has no sort of bearing on our case, because the Secretary of the Interior, unlike our case, was not vested with any jurisdiction in that matter. *But here in our case he is the only officer that is appointed to determine, and it is ex-*

pressly made his duty to determine, what lands shall be selected and taken to fill the grant.

Take the case of Doe vs. Wilson, 23 How., 457. In a treaty made with the Indians they ceded to the United States certain tracts of land—except certain reservations—among which was one to Pet-chi-co of two sections. The language of the reservation was: The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent." Then follows this sentence: "The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall be surveyed, and the boundaries to correspond with the public surveys."

Now what did the President do? The treaty was that he was to make the selections *within* the ceded limits. According to two cases—this one of Doe vs. Wilson, and its sequel, Crews vs. Burcham—it was offered to be shown that in making these selections he did not keep *within* the ceded lands, but had gone and selected land *outside*. These learned gentlemen would say that patent was void. The President in such a matter hasn't any more power than the Secretary of the Interior.

"In January, 1837, patents were issued to Pet-chi-co and his heirs for the two sections mentioned in the treaty. In 1845 certain persons obtained a deed from the heirs of Pet-chi-co, and under this deed the plaintiffs claim upon the ground that the deed from Pet-chi-co in 1833 was invalid. Wilson claimed under a later deed. The leading questions in the case were, therefore, whether Pet-chi-co had the right to make the deed when it was made."

Well, the Court said that in this action of ejectment the patent was conclusive.

That was reaffirmed in the case of Crews vs. Burcham (1 Black, p. 352).

Another striking illustration is the case of the United States vs. Schurtz (102 U. S., p. 373). In that case a homestead entry was made, followed by a patent *for lands which were not subject to such homestead entry*, because, under the Act of March 2, 1867, the lands thus entered were within the limits of an incorporated town. The Statutes of the United States of 1867 prohibited the making of any such pre-emption within the limits of an incorporated town. Such a pre-emption was made, and that was followed by a patent; but, after the patent had been executed, the question was whether it should be delivered. It was held that the patent was not void, though issued contrary to an express provision of law. I consider that case to fully cover these cases. Why does it not?

So in the case of Smelting Co. vs. Kemp, 104 U. S., p. 636 *(see other cases in our main brief on this subject of jurisdiction, pp. 69–91).*

Now, without pursuing this line any further, you get my point—namely, that, under this Act of July 3, 1866, the Secretary was vested with the power to determine what lands should fill or satisfy the grant. The same is equally and especially true under the Joint Resolution of July 5, 1862. Nobody else has the power. He has done it; he acted within the scope of his powers and jurisdiction in that respect; he embodied his decision in said certified list of May 19, 1871; and his decision cannot be held void in this action of ejectment by showing your Honors that perhaps, on the same state of facts, you would reach a different conclusion, that is to say, because you would, under the legislation

and facts and releases and surrenders, hold that the lands in question were not subject to selection as canal lands in 1871. If he mistook the law his decision may be avoided by the Government, if it chooses to come into court, and can make a case for it; but there never was a greater heresy; there never was a greater departure from all justice and sound principles than to hold that this solemn act of the Secretary of the Interior, which resulted in the only compensation which the Government of the United States has ever made for this vast expenditure, which resulted in giving to the men whose money built that canal the only compensation that the United States or the State of Michigan ever made, or is bound to make, certified in 1871, nearly twenty years ago, made the basis of great and vast interests for years and years; the holders of these lands acquired under this judicial procedure walking up and paying the taxes which the State of Michigan and its authorities—I am not urging that it is a technical estoppel—paying taxes year after year with the regularity of the seasons, which the State of Michigan and all these municipalities have levied; and I don't suppose, if I can catch the tone of the sentiment from the learned counsel's address, that they lay a very light hand upon this company either—I say I can conceive of no greater injustice than to hold under these circumstances that the action of the Secretary of the Interior is absolutely void. It is ours, it seems, to bear the burden of ownership, it is theirs to come in and "reap where they have not sown."

Well, now, see where false doctrines lead. I will suppose, if your Honors please, that this solemn act of the head of the Land Department is not totally void, and that the United States has to file a bill in equity

to cancel that act, and it comes into this Court with its bill in equity and sets forth the facts just as this record and this proof show them to exist; there is no court of equity on earth that would cancel that title. Why? The Government paid only the four hundred thousand acres that it agreed to give, the State of Michigan assented to it; for twenty years it has been acted on; other lands that we could have taken, if these objections had been made seasonably, are all gone, and in such a case even the Government would have no equity.

I am now speaking of the Joint Resolution of July 5, 1862, and the Act of July 3, 1866, and of the powers and jurisdiction with which they clothe the Secretary of the Interior; that when he adjudges, as he does in the recitals of this patent or certification, that these are vacant and unappropriated lands, and further adjudges and recites that they were subject to this grant of July 3, 1866, and are a part of the grant, the certification thereof to the State, and the State's acceptance of it, that these lands thus certified shall become the absolute property of the canal company, and that, with the sanction of Congress, whenever the Governor certifies that that canal is completed, and that certificate is to be put upon the public records of the County of Houghton, under these circumstances I maintain that everybody in the broad world can come and deal in these lands with the same sense of security that he can deal with any other titles. On the faith of this legislation the owners of this property have put millions into it. When the State has put an instrument of record to the effect that anybody may safely buy these lands, this heretical doctrine is bruited—that all this is

absolutely void, and that these lands are open to the first comer; and they come in here, and their counsel boldly assert here in this court of justice that the canal company is a trespasser, and that the squatters, like Cunningham, Donahue and Finan, come "having the wedding garment on." It makes one's blood boil to hear such pretensions urged in a temple of justice appointed to administer justice among men. And I understand, in consequence of this heretical doctrine, that all the Upper Peninsula is aflame, and in a furor, after other people's possessions; and that there hasn't been any land certified by the United States to any corporation for the last fifteen or twenty years that is not plastered over with claims—homestead and preemptors. It is time to stop such unseemly proceedings. They all come as the result of the false and heretical doctrine that the solemn acts of the Secretary of the Interior in respect of this grant are absolutely void.

That leads me to say, if your Honors please, in answer to the gentleman's remarks, that, while the subject of the complications arising out of this grant have been repeatedly before Congress, in one shape or another, chiefly at the instance of the private entry-men rather than us, there never *was a report made which did not propose to confirm the title of the canal company.*

THE DEFENSE.

The Railroad Grant of June 3, 1856, Set up to Defeat the Plaintiff's Title, Considered.

Now, if your Honors please, I pass from a consideration of the title of the canal company, so far as it is raised on that certification, assuming that it is *prima facie* good aside from the Confirmatory Act of March 2, 1889, hereafter considered, to a consideration of the attack which has been made upon it. I don't know of any other way to understand the case clearly, but to get the chronology of events in your Honors' minds.

On June 3, 1856, Congress made a grant of lands to the State of Michigan to build certain railroads (for text of this act see our main brief, p. 17, note). I make no observation now on the subject, except to say that at that time it was supposed, and continued to be supposed, until the decision of the Schulenberg case, that when the act said, as this act did, if those roads were not built in ten years the lands would revert to the United States, that there was an absolute reverter *ipso facto* on the failure of the completion of the line in the required time.

I call your Honor's attention to the feature of the act that the Governor represents the State in the selection subject to the approval of the Secretary of the Interior of the indemnity lands (Sec. 1). We are not dealing with the Legislature of Michigan in respect to the selection of the lands, but it is to be done by the Governor, and he certifies to the completion of the road (Sec. 4). That was a grant to give, among other

things to the State, a line from Marquette and Ontonagon to the Wisconsin State line.

On the same day, the 3d of June, 1856, the Congress of the United States made a grant to the State of Wisconsin (12 Statutes, 618), among other things, to build a railroad "from Fond du Lac, Wisconsin, northerly to the State line." The object of these grants, as interpreted by the State of Michigan, appears from the recital in the Michigan Joint Resolution of March 4, 1861, which was the one that initiated "the Menominee scheme."

Reads Michigan Act, March 4, 1861 (reprinted in our main brief, p. 27).

That grant to those two States made on the same day was to aid a system of railroads to connect the waters of Lake Superior with the railroad system of Wisconsin.

On the 20th of August, 1856, the Ontonagon and State Line Railroad Company was organized to receive this grant. The same year, in January, 1857, the Marquette and State Line Company was organized for the same purpose. They were skeleton companies, organized, doubtless, by the Chicago, St. Paul and Fond du Lac Railroad Company, and it has been proved before your Honors that the original companies never surveyed any line of road. Now, then, whatever they had was consolidated into the Chicago, St. Paul and Fond du Lac Railroad Company, and that consolidation was early in 1857. So the two original companies went out of existence, and all the talk of the learned counsel here to-day about this Ontonagon Railroad Company as a separate entity or existence has no place in this record.

The Chicago, St. Paul and Fond du Lac R. R. Co., early in 1857, merged both of the other roads, and was the sole owner of all the rights to this land grant, both

from Ontonagon to the State line and from Marquette to the State line. Whatever these original companies had by virtue of the legislation of the State, the C., St. P. & F. du L. had (Record, p. 149). Then what did it do? It filed a map of one continuous road from Fond du Lac, in Wisconsin, to the Brule River (which river divides Wisconsin from Michigan), and then it filed this other map, taking up the same line at the same time, but not the same surveyors, taking it up on a common trunk for a few miles into Michigan, and then making two branches, or what in all these proceedings is hereafter called branches, one to Marquette and the other to Ontonagon. This two maps were transmitted to the Department at the same time, and transmitted by the Chicago, St. Paul and Fond du Lac Railroad Company, and no other (Record, pp. 42, 43). There were no other maps. And they were approved. The legislative history of the grant, the location of the road and every fact connected with it shows that Congress and the State and grantees of the State intended to provide for ONE CONTINUOUS ROAD from Fond du Lac to Marquette and Ontonagon on Lake Superior, and not separate roads. Every certificate of these lands under the Act of 1856 refers to it as a certificate for the benefit of this Chicago, St. Paul and Fond du Lac Company. That consolidation was March 27, 1857, to be accurate. Now, there is no question about that consolidation, because it was ratified by the State of Michigan by implication in this same Act of March 4, 1861, that initiated the Menominee scheme (text of that act reprinted in our main brief, p. 27). So that we have, then, as early as March 4, 1861, the Chicago, St. Paul and Fond du Lac Company the acknowledged successor, by the consent and ratification of the State of

Michigan, of every interest of these two original companies, the Ontonagon and the Marquette, in this land grant.

At that date, be it observed, there were but three possible parties that had any interest in this matter, and those were, first, The United States; second, The State of Michigan, and, third, The Chicago, St. Paul and Fond du Lac Company, which owned everything; as well the lands on one branch as on the other. All that is recognized by the United States, as I said, in these certifications, made in December, 1851, which were all for the benefit of this company. This same company sent on these two maps at one and the same time, and they show on their face where these two roads come together here—trunk line running up from Wisconsin and one branch going off to Marquette and the other branch going off to Ontonagon. Now, it so happened that the map of the Ontonagon branch was first approved or accepted by the Interior Department. Well, if I should imitate my learned friends here I would say: "Oh, where is the authority of the Secretary of the Interior to accept the map of definite location? It don't say so in the act." But he is the great head of the Land Department, and he assumes, and rightly, the power to act upon and to approve that map. But the other route: "That line," he said, "looks a little like a ram's horn; you have got to explain why you run around in that way." It was explained, and a few days afterwards he approves that. Now, the learned counsel this morning says, "Oh, but, the Ontonagon line was approved first." I don't know whether he seriously based any rights on that approval; but it has been decided (well, I decided it once, and it went to the Supreme Court, and I believed they affirmed it)

and it has since been decided by the Supreme Court half a dozen times, that where there is a grant, as there is in this case, and lands finally fall within the "common limits," the fact that one line has been approved a few days before the other is a matter of no consequence. So that in law, this stands the same as to those two lines as if the approval had been on the same day.

I wish I had a map of Wisconsin and Michigan to show you where these original lines run to, through the centre of Wisconsin and Michigan. Well, no road was ever built there, I think, except twenty miles upon the Ontonagon end in 1881, by an organization whose birth was a disgrace to the State of Michigan which sanctioned the iniquity that company (the Ontonagon and Brule River Railroad Company) was organized to consummate. They did, after 1881, build twenty miles of what they called a railroad for the purpose of going down like a buccaneer and seizing lands which eighteen years before had been appropriated by the Government of the United States and the State of Michigan to pay for the construction of the canal. Well, now, I am not wasting a word, in my judgment. I am coming to this joint resolution of July 5, 1862, and I am coming to it so that your Honors can see it as the Congress of the United States understood the facts to exist when they passed that resolution; and when you see it in that light, all the fog with which these learned gentlemen have sought to invest it clears away, and it stands revealed to us, every word and every sentence, luminous and clear, as evincing what the purpose and intention of Congress was.

THE MENOMINEE SCHEME.

The Joint Resolution of July 5, 1862, and its Effect.

I will call this the "MENOMINEE SCHEME," to have a name for it. It worked a great revolution in this Act of June 3, 1856. Now, when was that initiated? The first evidence I find of that scheme appears in this Michigan Act of March 4, 1861 (reprinted in our main brief at p. 27). The recital in that act shows that the object was to connect Lake Superior with the railroad system of Wisconsin. Not to build the original line, but to complete the new or re-located line from Marquette down to the mouth of the Menominee. For that purpose, they transferred the power over the Marquette and State Line grant to the Board of Control, and made it the duty of the Board of Control to confer the said lands upon some other company.

Congress said: "We make a grant of lands to build a road from Marquette down to the State line of Wisconsin," and this road had been, before this time, definitely fixed, you see, and, of course, it was utterly beyond the power of the Board of Control, without the sanction of the Legislature of the State of Michigan, and of the United States, to take these lands from that Marquette line and hand them over to a line that went down the lake shore; but the Legislature of Michigan put these lands in charge of the Board of Control, and made it their duty to confer them upon some company that would build the line, and they said the proper line to build was to go down to the mouth of the Menominee. Well, that initiated the Menominee

scheme. That was on the 4th of March, 1861. At this time the railway company was in default under Section 19 of the Michigan Act of February 14, 1857 (text, see our main brief, p. 19). Meanwhile, as this Act of the Legislature recites, the Fond du Lac Company had become insolvent, and the property in Wisconsin was transferred to another company. That is what the Legislature of Michigan says; and this proof shows that that other company was the *Chicago and Northwestern*. Therefore, at this date, the only parties on the face of the earth that had any interest in this business was the United States, the State of Michigan and the Chicago and Northwestern Railway Company; and what all those three parties wanted done, they could do. Now, they all united in this scheme.

The next thing was, and I want to get that in your Honors' minds, because it throws a flood of light on this resolution of July 5th, 1862—on December 12th, 1861, if you will turn to the record, you will find there the "certification to the State of 112,145 and $\frac{38}{100}$ acres of lands to aid in the construction of a railroad from Marquette to the *Wisconsin State Line*" (Record, p. 106). Now, let us see what that is.

The Court here took a recess until P. M.

AFTERNOON SESSION.

Joint Resolution of July 5, 1862, Continued.

If the Court please, at the time of the adjournment I was calling your Honor's attention to the different certifications on December 12, 1861, of these lands under the Act of 1856 *(For accurate description of these lists see our main brief, p. 26)*.

Bear in mind that the date of these certifications is the 12th of December, 1861. When those lists were on file, thus certified to the State, the next step in the "Menominee scheme" is the one whereby the Board of Control was asked to transfer the Marquette and State Line lands to the Peninsula Company, a man "Friday" of the Chicago and Northwestern, organized to build to the mouth of the Menominee from Marquette. The reason why that company was organized by the Northwestern Railway Company is very obvious. The Chicago and Northwestern at this time owned everything, but it had no franchise by which it could build a road on the new line, which they desired to build from Marquette to the mouth of the Menominee, for its franchise, as the successor of the Fond du Lac road, was to complete the railroad upon the original line, and hence it was a necessary step in the scheme to organize a company under the laws of Michigan, with corporate authority to build a line on the route proposed from Marquette to the mouth of the Menominee. The Peninsula Company was a shadow—a "man Friday" of the Chicago and Northwestern—and was soon afterwards consolidated with that company. Now, they organized

this Peninsula Company—this "Friday" of the Chicago and Northwestern—with authority to build that line, and then, as appears in the proofs, the president of both companies—that is, the Peninsula and its father, or promoter, or godfather, the Northwestern—went to the Board of Control and said: "Please give us these Marquette and State Line lands for this new line." That was on the 24th of April, 1862, and the board made the *ultra vires* order—it amounted to nothing if it had not been confirmed—which you will find here in the proofs (Record, p. 134), regranting lands which are or may be granted under the Act of 1856 to aid in the construction of a railroad from Marquette *to the Wisconsin State line, not merely to the point of junction or intersection with the common limits*, but the lands which were originally ganted under the Act of 1856 to build a road from Marquette DOWN TO THE STATE LINE, to hand those lands over to the Peninsula Company. That order made on that day was *ultra vires*, because after those lands had been certified for this line they could not hand them over to build a line somewhere else. That was the first step towards ratification which they afterwards got both from the State and from the United States; then they adjourned with a memorial to Congress, that Congress would make the change that was desired to enable the utilization of these lands for that new line. That was April 24, 1862.

The next step in the history of this business was on the same day, or on the 25th of April, 1862, while this was taking place in Lansing, when Congress of the United States moved by the Chicago and Northwestern Company passed a joint resolution which you will find in the 12 Statutes, 618, which we have reprinted

here for convenience (reprinted in full in our main brief, pp. 28, 30). It is the prototype of the joint resolution of June 5th, 1862. It has a very important bearing on the common limits business especially.

" A resolution supplementary of and in addition to the Act of June 3, 1856, granting public lands to the State of Wisconsin to aid in the construction of railroads in said State."

" That the word ' Northerly ' in the first section of the Act approved June 3, 1856, shall, without forfeiture to the State or its assigns, of any rights or benefits under said Act, or exemption from any of the conditions or obligations imposed thereby, be construed to authorize the location of the line of railroad in said first section provided for upon any eligible route within Ranges 16 to 23 inclusive, east of the fourth principal meridian."

So that instead of running from Fond du Lac north through an almost uninhabited wilderness they swung the road around on the present line of the Northwestern Railroad Company to the mouth of the Menominee, and this resolution of the Board of Control is a mere sequel of this, or a part of the same machinery. There is this difference, however, and it is very material.

" And the line of railroad, as now located, according to the records of the General Land Office."—That is to say, that you read this map right into this resolution.—It was all before Congress, they knew what they were about. " And the line of railroad, as now located, according to the records of the General Land Office in pursuance of said act is hereby authorized to be changed within the above specified limits ; provided, however, that upon the construction of said railroad upon the new line, or of a sufficient part thereof, according to the terms of said act [of June 3, 1856], the State of Wisconsin, its grantees or assigns, shall receive upon the route originally located, and in the manner prescribed by the act the same quantity of lands, and no more or other, except as hereinafter provided for, as it or they would have received if such railroad had been constructed upon the line originally located " (Sec. 1, Joint Resolution of April 25, 1862).

Well, that may be artful, since it was a shorter line than the old one, but they got the same amount of land. So that the old land grant in *Wisconsin* stood on the line originally located, and was to inure to the benefit of the new location to the same amount, and no more, when it built the new line. That is, the land grant stood, but the road was to swing around. That was on April 25, 1862. The status at that time, was, that the Marquette lands had been conferred at the instance of the Northwertern on the Peninsula Company to go to the mouth of the Menominee. You understand that at this time the Northwestern was the owner of the rights of the Chicago and Fond du Lac Company, and of the land grant, as the assignee of the State, both of the Ontonagon and the Marquette branches, except so far as the Board of Control, by its *ultra vires* order, had undertaken to confer the Marquette lands to build a line that was not authorized as yet in Michigan by any act of Congress.

What was the purpose of the Northwestern Company as the owner of all this land grant? It was, of course, if that scheme was carried out, never to build the line from Marquette to the State line on the original route, and the line from Ontonagon was never intended to be built, at all events, so far as the Northwestern is concerned. That would be clearly inferable, if we simply looked at it with the eyes of men of common sense, and this purpose was declared in Congress (our main brief, p. 33, note), and was demonstrated and put on record afterwards, when the Chicago and Northwestern Company executed the release, which I will come to presently, of all the clear lands of which it was the unquestioned owner as assignee of the State at that time on the Ontonagon

line, and all the lands in the common limits, and all the lands in the clear limits of the Marquette and State Line.

JUDGE MARSTON: Judge Dillon, isn't that in accordance with the view that we attempted to express, that the effort, by your mortgage foreclosure, to get the title into the Chicago and Northwestern, which was opposed to the building of that road, would be contrary to public policy, *ultra vires* and void.

JUDGE DILLON: That is your view. But it was not *ultra vires*. The Northwestern was the legitimate successor, and could have built every line—this line from Fond du Lac north, the Marquette branch and the Ontonagon branch—and get every acre of that land if it had chosen to do so. It was not contrary to the public policy of the State of Michigan, because, if you turn to the above-mentioned Act of March 4th, 1861, it recites that the Chicago and Northwestern Company has become the assignee of the Fond du Lac Company.

True Reading and Purpose of the Joint Resolution of July 5, 1862.

Now, then, we know where we stand when we come to this joint resolution of July 5th, 1862. There were at that time but three parties that had any interest in this business. One was the United States of America, the other was the State of Michigan, and the other was the Chicago and Northwestern Company and its rights were subject to forfeiture by the State under the Act of February 14, 1857 (Sec. 19). Congress had passed the Joint Resolution of April 25, 1862, authorizing a change of the line in *Wisconsin*. These

two resolutions of April 25 and July 5, 1862, came from the same matrix; they read the same; they are parts of one scheme. This Act of July 5, 1862, is so plain to my mind, that if your Honors will follow me in the reading of it, I don't see how it can originate any doubts in your minds as to what Congress meant or intended. "*The words 'Wisconsin State Line'* in the first section of the Act of 1856" which section was, "That there is hereby granted to the State of Michigan to aid in the construction of railroads from Little Bay de Noquette to Marquette, and thence to Ontonagon, and from the last two named places to the Wisconsin State line." "*That the words 'Wisconsin State Line,' in the first section of the act, shall, without forfeiture*"—that is material—"*be construed to authorize the location of the line of railroad provided for in said act.*" This is an instance of legislation where this Joint Resolution of July 5th, 1862, is intended to be read *nunc pro tunc*, and as if this had been the original provision in the Act of June 3, 1856. Construction of such provisions see M., K. & T. Ry. Co. vs. K. P. Ry. Co., 97 U. S., 491, 497; K. P. Ry. Co. vs. Atchison, &c., Co,, 112 U. S., 414, 417; U. S. vs. Burlington, &c., R. R. Co., 98 U. S., 334.

"*That the words 'Wisconsin State Line' in the Act of 1856*" should be read as if they were as follows: "*Shall be construed to authorize the line of railroad provided for in said act.*" Now, that don't say whether it is Marquette, Ontonagon, or either or both. It is "*the line of railroad provided for in said act.*" That is the line of railroad that goes to the Wisconsin State line, owned by the Northwestern Company. "*From Marquette, on Lake Superior, to the Wisconsin State line, upon any eligible route from the Township of Marquette aforesaid,*

to a point on the Wisconsin State line near the mouth of the Menominee River, and touching at favorable points on Green Bay. And the line of railroad as now located in pursuance of said act"—from where? These learned gentlemen say, from the point where the **clear limits of the Marquette line touch the common limits.** That is to say, if the clear limits of the Marquette line are up here, say ten miles from the State line—

JUDGE MARSTON: Why, we never said so, Judge Dillon. Please quote us correctly.

JUDGE DILLON: Then do you say this: That this Joint Resolution of July 5, 1862, authorized a change of the line to the new route, all the way from Marquette *to the State line?*

JUDGE MARSTON: No, sir; from Marquette to the Menominee, if they thought proper to do it.

JUDGE DILLON: The new road is from Marquette to the Menominee. Did the Joint Resolution of July 5th authorize an abandonment of the old line, all the way from Marquette *to the Wisconsin State line?*

JUDGE MARSTON: That road never agreed to build to Wisconsin State line.

JUDGE DILLON: You see they don't come up to the bull-ring!

I will read the act. "*And the line of railroad as now located in pursuance of said Act of 1856, from Marquette* TO THE WISCONSIN STATE LINE, *according to the records of the General Land Office.*" These records

are thus read right into the Joint Resolution of July 5, 1862: "Is hereby authorized to be changed, so as to conform to the route above indicated from Marquette to the State line at the mouth of the Menominee." The old line was to the Wisconsin State line at Brule River, and the new line was to be from Marquette to the Wisconsin State line at the mouth of the Menominee, which is also the boundary line of the State.

"And the line of railroad as now located, in pursuance of the said act from Marquette *to the Wisconsin State line* is hereby authorized to be changed," &c. The learned counsel now says it don't mean the State line unless they would agree to build down to the State line. Well, that is not the Act of Congress.

"According to the records of the Land Office is hereby authorized to be changed so as to conform to the route above indicated, which line, when surveyed, and the maps and plats thereof filed in the proper office, as required by the Act of June 3, 1856, shall confer the same rights upon and benefits to the State of Michigan and its assigns in said new line as though the same had been originally located under said act" (June 3, 1856).

Whom does "assigns" mean? It means the Chicago and Northwestern Railroad Company, or the Peninsula Company, one or the other, or both. "Shall confer the same rights upon and benefits to the State of Michigan and its assigns in said new line as though the same had been originally located under said act." That is to say, it authorized an entire change, a change of the entire line of road "from Marquette *to the Wisconsin State line*," so as to build the substituted or new line from Marquette to the Wisconsin State line at the mouth of the Menominee. And the rights of the State

and its assigns shall be the same as if this new or Menominee line had been the one originally located under the Act of 1856. In point, see M., K. & T. Co. vs. K. P. Ry. Co., 97 U. S., 491, 496; K. P. Ry. Co. vs. Atchison, &c., Co., 112 U. S., 414, 417; U. S. vs. Burlington, &c., Co., 98 U. S., 334.

I will show your Honors when I take up each section of this joint resolution that our construction thereof harmonizes with the language and the obvious purpose of every section, and that the theory and propositions of the learned gentlemen on the other side fly in the face of the language and in the teeth of the obvious purpose of every section.

"SEC. 3. *That the Secretary of the Interior be, and he is hereby authorized to cause all* EVEN *sections, or parts of even sections*"— Under the original land grant the even sections were two-and-a-half-dollar lands. When these lands had been certified and rights had accrued, Congress had to make some provision:

"The Secretary of the Interior is authorized to cause all *even* sections or parts of even sections of public lands that may be brought within six miles of the new line of railroad, as herein provided for, to be sold at the same price, and in the same manner as they might have been under the Act of 1856."

That is, the even sections on the Menominee line, within six miles thereof are to bear two dollars and a half an acre. Well, is that all? "*All purchasers*," &c. Now, what does that mean?

"And all purchasers, or their heirs or assigns within six miles of the originally located route, who shall be more than six miles from the new line of route hereby authorized and who have paid the sum of two dollars and fifty cents an acre, shall have the right to change their location upon the line as first established, to the new line, upon the same terms, in like

quantities, and in the same manner as on the first established as aforesaid, or at their election they may enter any lands subject to private entry an additional amount at a dollar and a quarter an acre " (Sec. 3).

Thus, all purchasers or their heirs or assigns within six miles of said originally located who shall be more than six miles from the new route shall have their lands treated as a dollar and a quarter land. This brings up the point of difference between us. The other side have to maintain, if they are right, *that that makes a provision for the* EVEN *sections along the* CLEAR LIMITS *of the Marquette line.* That is to say, on that list of 112,145.38 acres (Record, p. 106); that is to say, if a man has purchased at $2.50 an acre any even section in the clear limits of the Marquette road, that being abandoned, or contemplated to be abandoned, he may either exchange his location to the new line, or he can keep his land at $1.25, and take the other dollar and a quarter and get lands elsewhere.

They say—if they don't say it, the logic of their position compels them to say it—that that remodeled provision in the Joint Resolution of July 5, 1862, is restricted to the "*clear lands*" on the Marquette branch. We say not so.

Mr. Dickinson: The option to change is given as to the clear limits, and as to the common limits. The privilege which is given to take lands in the common limits is supplemented by an option to change it because of the relocation of the Marquette and State Line Railroad.

Judge DILLON: Now, then, that gives away their case! It cannot stand. That concession is absolutely fatal to their claim in respect to these "common limits" lands, and I will show it. The learned counsel admits, when this Joint Resolution says, "That all purchasers or their heirs or assigns within six miles of the originally located route who are more than six miles from the new route," that that extends to purchasers in the common limits. That can only be so on the supposition that the Congress of the United States understood that there was to be no railroad within six miles of those lines, constructed by the Marquette and State Line Company, the Ontonagon and State Line Company, the Chicago and Northwestern Company or anybody else; and if there were to be no railroad lands, no $2.50 lands in the common limits, they are not railroad lands, and there is an express provision further on that shows that Congress so contemplated it.

"SEC. 4. That the *even* sections of public lands reserved to the United States by the aforesaid Act of June 3, 1856, along the originally located route of the Marquette and Wisconsin State Line Railroad Company"--that is a misnomer, because there never was any location of a route by such company. It meant the Northwestern—"except where such sections shall fall within six miles of the new line of road so as aforesaid proposed to be located, and along which no railroad has been constructed, shall hereafter be subject to sale at $1.25 per acre."

I suppose the concession of the learned counsel is that all even sections in the common limits became subject to purchase at $1.25 an acre.

MR. DICKINSON: The concession of counsel goes no further than this: When these purchasers took

lands at $2.50 they took them when the provision was that there should be two lines of road there; they were given the option to change it, if by the change in the law there was to be but one line of road there.

Judge Dillon: Do you suppose that the Congress of the United States intended that if the Ontonagon road had been contemplated to be built, and purchasers were within six miles of that road, that they should have their land at $1.25, and that the United States would go on and sell the even sections at $1.25?

No! The fact is that it was intended that the building of the Ontonagon as well as Marquette branch to the Brule River was to be abandoned and the new line substituted; *and Ontonagon would get its connection with it through the land grant aided Marquette and Ontonagon R. R. Co.* (Sec. 4, Michigan Act, February 14, 1857).

Now, then, notice this language: "*And along which no railroad has yet been constructed.*" That is put in, because the history of this State shows that at the upper end here there had been some railroad actually constructed by another company, viz., the Marquette and Ontonagon R. R. Co., out of Marquette towards Negaunee, and this provision was put in, so that in respect of these even sections they are still to remain $2.50 lands wherever they are within six miles of the Menominee line, or within six miles of some railroad that was then, on the 5th day of July, 1862, actually constructed and in operation. We say that the idea, even within the common limits, that there were any $2.50 lands, which price assumes that there is or will be a railroad,

is wholly inconsistent with every provision of this Joint Resolution of Congress, and all these remodeled provisions in the Joint Resolution of July 5th *are on the basis that there is not to be any railroad constructed within six miles of those lines, either by the Ontonagon or any other company.* This section, therefore, demonstrates that the Ontonagon line was abandoned.

Now I come to the fifth section.

"*That upon the filing in the General Land Office of the lists.*" There is a Providence in this world, and that Providence guards the truth and preserves it from destruction; and it is found often in apparently the most insignificant circumstances. "That upon filing in the General Land Office of the '*lists*'"—plural. The word "lists" is twice used in this section. Now, these learned gentlemen contend that the only thing that the Act of Congress or the Legislature of Michigan ever intended should be released to the United States of America is the land in the *one single list* of 112,143 and $\frac{23}{100}$ acres of "clear lands" certified for the benefit of the Marquette and State Line branch. I believe that is Judge JACKSON'S opinion. If so, I respectfully submit that it cannot stand. His attention, however, was not directed to these considerations. I do not ask your Honors to revise his decision, for you will not do it. Judicial courtesy requires that you shall not do it, and you have announced your purpose to stand by it. But the question is open, untouched by that decision, as to what was the purpose of Congress in respect of these "common limits lands," I say untouched by his decision, for he had no question of that kind before him. These four "lists" had been certified, may it

please your Honors, on the 12th day of December, 1861 (Record, pp. 106–109). They are referred to in this Joint Resolution of Congress, and for the purposes of judicial construction these "lists" made a part of it. If the word "lists" had only been used once you might say that was a clerical error. The difference between us is: They say that there was no authority from Congress except in respect to one list, *one single list*. We say Congress meant just what they said. They meant, "That upon the filing in the General Land Office of the '*lists*' of the said railroad lands." Every word is very material; to be weighed as if it were so much gold.

THE COURT: What does the word "said" refer to?

JUDGE DILLON: "Said railroad lands." Those that are contemplated in all the previous parts of the act, Secs. 1 2, 3 and 4. The lists are not before referred to, but the lands are referred to in Sections 1, 3 and 4 as having been granted by the Act of 1856.

MR. DICKINSON: Viz: From Marquette to the Wisconsin State line.

JUDGE DILLON: Well, I am not on the Ontonagon clear lands now, but I will say here that it did at least mean clear down to the Brule River and *to the Wisconsin State line*, which is enough for the common limits case.

"That, upon the filing in the General Land Office of the lists of the said railroad lands, in whole or in part" —these are very material words a little further on—"as now selected and certified in the General Land Office"

—just the same as if it had said, "which lists are as follows," and had set them out *in haec verba:*

"*Upon the filing of those lists in the General Land Office with the certificate of the Governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claim to the lands aforesaid in the lists, so far as they set them forth.*" That they might put them all in, or they might put in part. "Surrender all claim to the land as aforesaid set forth and described in the 'lists' thereof thus certified, and that the same have never been pledged or sold, or in anywise incumbered." Then follows the more apt word in the whole range of language to indicate a condition and express a condition precedent. That *upon* so and so, *then*, and not otherwise,

"the State of Michigan or its assigns shall be entitled to receive a *like quantity of land, selected in like manner, upon the new line of road as thus surrendered upon the first line*, and to the extent of six sections per mile in the aggregate for every mile of the new line according to the general provisions of the Act of June 3, 1856."

If your Honors please, when the parties interested came to administer this Joint Resolution they first filed with the Secretary of the Interior a relinquishment of the clear and common limits lands on the Marquette and State line, and afterwards, as I shall explain, the department said, "You can only get on the new line the same quantity of land that you surrender on the old." The line from Marquette to the State line, as it appears here, was about sixty-six miles long; the line from Marquette to the Menominee is one hundred and twenty-three miles in length. The Chicago and Northwestern and its "Friday" company, the Peninsula,

who are all assenting to this, own all the rights of the State in both of these grants; and when they had built some of the road on the new line they applied to the United States for certification of the lands, and they *applied for more than the amount surrendered in the Marquette clear and common lists.* That brought up the question of the true construction of this Joint Resolution of July 5, 1862, and it was then construed—in my opinion rightly construed—and I believe your Honors will agree that it was rightly construed, *that the State of Michigan was entitled to no more land on the new line in acres than it surrendered on the old.*

"Then the State of Michigan shall be entitled to receive a like quantity of lands, selected in like manner, upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile in the aggregate for every mile of the new line."

That is plain. That is the utmost—the maximum. They don't know how long that new line might prove to be; but, in any event, the maximum is six sections per mile along the new line, and not that unless they surrendered an acre on the old line for every acre they got on the new line. Now, then, what was done under that? The United States suffered, I guess. But if so it was not by reason of any act of the canal company, but by the fine Italian hand of the railway company. At all events, it is in evidence here that the amount actually surrendered in the Ontonagon clear list, in the Marquette clear list and in the common list—not the moiety, but the whole—amounted to only

340,000 acres, and the State of Michigan and the Northwestern Company got in lieu thereof 390,000 acres on the new line (Record, pp. 163-165, for documents showing this).

There was some suggestion, I think from the Bench, yesterday, whether that would bind the State. The ten years limited in the Act of 1856 was not out. The Legislature, March 4, 1861, asked that this thing be done; at all events the Board of Control undertook to do it, and on the 18th of March, 1863, the Legislature ratified the act of the Board of Control in this matter, and expressed its assent to the provisions of the Joint Resolution of July 5, 1862:

"The grant of lands conferred by the Board of Control upon the Peninsula Railroad Company under authority of an act approved March 4, 1861, and upon the relocated route, authorized for military purposes by resolution of Congress, approved July 5, 1862, is hereby confirmed unto the said Peninsula Railroad Company, provided it shall construct the railroad referred to according to the requirements of the act and resolution of Congress herein referred to" (reprinted in our main brief, p. 35).

This is adopted by the State; and the effect of this important Act of March 18, 1863, is that, whenever this new line of railroad shall be constructed, the authorities of the State without any further legislation, shall be authorized to carry into effect the provisions of the fifth section of the resolution of July 5, 1862. Is there any doubt about that? If that is so, then the basis of Judge JACKSON'S decision, so far as it rests upon the proposition that some other Act of the Legislature was necessary—some other Act of the Legislature author-

izing the Governor to execute a relinquishment would be necessary, in order to make any relinquishment effectual—is not sound. The Legislature, in and by this Act of March 18, 1863, have expressed their assent to the provisions of this Joint Resolution of July 5, 1862. Observe that Congress deals in this matter with the Governor and the Railroad Company. At all events, Congress said, "that upon filing in the General Land Office of these 'lists,' as now selected, with the certificate of the Governor, under the seal of the State, that it has surrendered all of its rights within the State of Michigan, they may be entitled to select other land." It is in evidence that these lists were filed, and that the State, acting under this Joint Resolution, and under the Acts of its own Legislature, **did select an acre of land on the new line for every acre on the Marquette and State line, an acre on the new line for every acre in the common limits, and an acre on the new line and more for every acre on the Ontonagan line.** Its Governor selected them, the United States certified these lands to the State for the benefit of the Chicago and Northwestern Company, and the State, as we showed yesterday, has patented that Company 390,000 acres, selected in lieu of all these lands, on both the Marquette and Ontonagon branches (Record, pp. 163–165).

THE COURT: Do you think that the certification by the Secretary of the Interior of the surplus was unauthorized? I mean the difference between the total of the old land surrendered and the lands on the new line.

JUDGE DILLON: It would be my view that it would be; but it would not follow, therefore, that the certification was void. The United States might avoid it as to the excess or surplus. I think that is very clear.

Is there any evidence that Congress intended to make a new and additional grant of lands anywhere in the compass of this resolution of July 5, 1862? Not the slightest. Suppose they had surrendered twenty-five, two hundred and fifty or five hundred acres? That would be a part of it. This Joint Resolution says, "*If they surrender in whole* OR IN PART." Now, suppose they surrendered ten thousand acres. Can they then come in and claim on the whole new line six sections a mile? At all events, the construction put upon it by the department was that it said to this company, "You must also surrender on the *Ontonagon clear lands*, if you want the lands that you now apply for, the quantity applied for on the new line."

The Releases and Surrenders to the United States.

I suppose, your Honors, it is clear now about these releases. The first release was by the Peninsula Company to the United States in 1863. It had not then consolidated. I do not attach any special importance to that instrument except as it shows, and very clearly shows, in its language, what they understood in respect of these "common limits" lands. After reciting the relocation of the road:

"It shall be re-located so as to terminate at or near the mouth of the Menominee River on Green Bay, and *not on the Brule River as heretofore located.* Now, therefore, the said Peninsula Railroad Company, in consideration of the premises, and in consideration

that the United States will cause or permit the relocation of said land grant so as to conform to said new line, under the provisions of said resolution and the acts aforesaid, do hereby release and surrender to the United States of America all right, claim and interest in and to so much of the lands heretofore located on the original proposed line of the Marquette and State Line Railroad from Marquette *to the Brule River in township forty-two north, of range thirty-five west, sufficient to cover 161,104.38 acres*" (Record, pp. 148, 149).

JUDGE MARSTON: Is there certified to the Marquette and State Line, within the clear limits, then adding to that the entire lands certified to the two companies within the common limits, will it make up that complement?

JUDGE DILLON: No, it would not make it. But this is certain, that it takes every acre in the clear list *and also every acre in the common limits* to make up the 161,104.38 acres there recited, and that is not enough either. It shows, therefore, the purpose, not only by the geographical description given, going down to the Brule River, *and giving the township and range*, but by the *quantity they released, that they intended to* SURRENDER EVERY ACRE DOWN THE STATE LINE AT THE BRULE RIVER. That is the weighty significance of that document. They did intend to do it, and they put that instrument on file, as you will see, we got it from the files of the General Land Office. That is very material, when I come to advert further to the power and jurisdiction of the Secretary of the Interior. *That was one of the documents that was before him when he exercised his lawful jurisdiction in this matter of selecting lands under the canal grant.*

Next in chronological order is the Joint Resolution of the State, approved February 21, 1867. Notice its language:

"That the Governor be, and he is hereby, authorized to execute and file the certificate of non-incumbrance and surrender to the United States of the land on the original line of said railroad."

From Marquette, I say, to the State line. I am now talking, you see, about the "common limits" land.

Now, whatever the Joint Resolution of Congress authorized or required, this Joint Resolution of February 21, 1867, is legislative authority to the Governor to execute. But, even if that did not exist, if that act never had been passed, and the Governor had, under the fifth section of the resolution of July 5, 1862, and the aforementioned State Act of March 18, 1863, filed this list, with the great seal of the State attached, and then the State went on, as it did, and selected lands on and along the new line and gave them to a railway company—issued patents for them—would any court of justice entertain the question, and sustain it, as to whether the Governor had any authority to do that?

JUDGE MARSTON: We got a very respectable Court to do it.

JUDGE DILLON: Well, I have not seen it. I am now talking about these common-limits lands.

Now, before that resolution of February 21, 1867, the Northwestern Company had been consolidated with the Peninsula. That consolidation was in October, 1864 (Record, p. 138). Therefore, the only parties interested in the transaction at that time were the

United States, the State and Northwestern Railway Company. The ten years authorized by the Act of 1856 to build this road had elapsed, and not a mile built—the whole thing subject to be blown out by Congress like you blow out a light—the only parties interested in that business at that time in 1868, was the United States of America, the party chiefly interested, the State of Michigan as a mere trustee, and the Chicago and Northwestern Railroad Company. Was there a single man or company on earth, except those that had interest in this business? Clearly not.

Now, the beneficiary of the State, the Chicago and Northwestern, the owner of every residuary right, or existing right on the Ontonagon line, and the lands in the common limits on the Marquette line, executes this release to the State on the 31st day of January, 1868 (Record, p. 138). That release was born of the Joint Resolution of July 5, 1862. The Governor was required to file a certificate that the State had not sold or incumbered these lands, and it could not do that; it had sold them. Before his Excellency was authorized to file that certificate he had to get that paper from the railroad company.

What is that release? It is a release by the Chicago and Northwestern Railroad Company to the State of Michigan of the "clear lands" in the Marquette and State line of the 112,000 acres (Record, pp. 151–153). Every acre of the Marquette clear lands was relinquished, and also the lands common to the Marquette and State line, and the Ontonagon and State line. That is, this 41,000 acres of common limits lands. This includes the Donahue tract. Every acre of those which had been certified in that list is surrendered; and also lands "common" to the Onton-

agon and State line, and the Marquette and Ontonagon. Then the Governor, after having obtained that release, executes his relinquishment to the United States to all these lands, *to every acre in the common limits, every acre of the Marquette clear lands*, and *the common lands on the north, leaving unrelinquished only the "clear lands" on the Ontonagon line* (Record, pp. 153–155). That was May 1st, 1868.

Here is a letter from the Commissioner of the General Land Office to the solicitor of the Chicago and Northwestern, saying: "We cannot certify any more lands to you on your new line until you release the old Ontonagon clear lands." There are various letters of the Commissioner. I will just refer to one of them: October 6, 1869. Letter from the Commissioner of the General Land Office to P. J. Avery, President of the Canal Company:

"It is further shown that on the 9th of July, 1868, a release was filed by said State and Railroad Company descriptive of the tracts along the branch line to Marquette, which covers the tracts embraced in your preliminary list. In regard to your impression that the release is defective, I have to say it is complete and meets the requirements of this office. It will be necessary to have the selections in said list verified by the Register and Receiver at Marquette, and the fees required by law paid; and, upon their being returned to this office for examination, if found correct, they will be submitted for approval. The tracts in Township 44, Range 34, making 358 and $\frac{87}{100}$ acres, referred to in your letter of 12th July last as being suspended in your lists of selections, **requires a release from the State authorities as land certified to the State for the abandoned branch line, which was to run from the State line to Ontonagon. And, for this purpose, I transmit herewith a form of release used**" (Record, p. 121).

In December, 1869, the Commissioner of the General Land Office writes to the Register and Receiver at Marquette:

"In regard to the branch line to Marquette, I state that the lands heretofore certified by the Department have been duly released by the State and railroad company, which release was filed 9th of July, 1868; and, further, that the lands certified for the branch line to Ontonagon have not, as yet, been released. **It will, therefore, be necessary for the State and railroad company to file a complete release descriptive of the tracts along said branch road before the selections are made by the canal company along said line**" (Record, p. 168).

Then the Governor consulted the Attorney-General. I am not going to take up your time with that. But, at all events, on June 17, 1870, the Chicago and Northwestern released to the State 142,430.23 acres (which were discussed in the Cunningham case) of "clear lands" on the Ontonagon branch (Record, p. 158), and the Governor released them to the United States on the 17th of August, 1870 (Record, p. 161); and these lands were not selected and certified to the canal company, under the canal grant of July 3, 1866, until after all this had been done—so far as the lands here in dispute are concerned, at all events—to wit, May, 1871.

There has been a distinction drawn from the beginning, and maintained to this very hour, in the Department, between the lands in the "common limits" and the "clear lands"—those up there; and it is in that way that these relinquishments were made by the Governor.

There have been since that time, down to 1889, 51,600 of odd sections disposed of by the United States

and 78,820 of even sections; and of those odd sections 16,360 have been actually patented, and of the even sections 46,680 actually patented, a very large part of them being in the common limits (Record, p. 178).

MR. BALL read to your Honors a letter of instructions from the Land Office in Washington—to the Register and Receiver here—of a very recent date sustaining the right to make pre-emption on the *odd* sections within the "common limits," and as of the date when they were applied for. It appears, therefore, that these lands have been treated and dealt with by the Secretary of the Interior, and by the Land Department, as not subject to any railroad grant, but as public lands of the United States ever since these several relinquishments by the Governor of the State.

JUDGE MARSTON: Judge Dillon, that is not correct.

JUDGE DILLON: Oh, there have been letters from time to time, but the great fact stands out, does it not, that the United States have sold and patented a large quantity of these lands. I have here a letter from the Department of the Interior, signed by S. M. Stockslager, Acting Commissioner, dated March 19, 1888, to the Register and Receiver at Marquette:

"By the decision of September 29, 1887, in the case of Wakefield vs. Cutler, Frank & Laydon, involving an odd-numbered section within the common six-mile limits of the grant for the Ontanagon and State Line and the Marquette and State Line Railroad Companies, this office held that the odd-numbered sections in said limits were not subject to private cash entry" (Record, p. 169).

Why? Not because they were not public lands, but simply because, under the resolution of July 5th,

1862, they had not been "re-offered for public sale" (Sec. 5). That is all.

JUDGE MARSTON: Let me call your attention to the letter from Secretary Schurtz, and see whether the Department have always held so.

JUDGE DILLON: Well, that is talk; not action. I am reading actual decisions now:

"I have before me a large number of applications to apply for and enter odd-numbered sections within said limits, which have been transmitted to this office on appeal from your action rejecting the same at various times during and since the year 1881, and upon which action has been suspended in this office pending the decision of the question as to whether or not such lands were subject to entry under the settlement laws.

"The applications referred to are for lands which are clear of claims of record in this office, and there being no conflicting claims (except as the applications conflict with each other), and it having been held as aforesaid that the State had waived any claim it may have to the lands, I see no reason for further suspension of action upon said applications, which are accordingly herewith returned for allowance as to the odd sections as of the date of their presentation."

That is the decision of the Department (Record, p. 169).

Power and Jurisdiction of the Secretary of the Interior to Consider and Act upon the Releases and Surrenders.

These releases were filed; people came in and asked to make cash entries of *even* sections, they came in and asked to make pre-emption entries of *odd* sections; they came in and offered to make pre-emption and homestead claims on these lands in the common limits, and the agents of the State of Michigan also

came in and said, "They are public lands, and we want to select some of them to fill the Canal grant." All these things came up in the Interior Department for action. Is this a country without law? Is it a country without anybody authorized to act on these important questions, and who was authorized to pass upon them? Under the legislation applicable to the canal company, under the Joint Resolution of July 5, 1862, and under the general legislation of Congress, putting the administration of the public lands in the hands of the Secretary of the Interior, his department was authorized to act upon these matters. Nay, more! Turn to Sections 3, 4 and 5 of the Joint Resolution of July 5, 1862, and you will find that the Secretary of the Interior is not only authorized to act, but IS REQUIRED TO ACT ON ALL OF THESE MATTERS. And, yet, they say he has no jurisdiction! **It is an entire misconception, a palpable solecism, to say that he had the power to act if he made a right decision, and no power to act if he makes a wrong one.** Neither the Court, the Secretary of the Interior, the counsel, nor anybody else can pass upon the question whether these lands, either in the clear or in the common limits, were the public lands of the United States, without passing both upon a question of law and of fact. The Secretary of the Interior is vested with that power. The Canal grant says that these lands are "to be selected," and these selections are to be approved by him; and, in the exercise of his powers and duty he construed these various releases, from the company to the State, and from the State to the United States, as restoring these lands, every acre both in the clear and common limits, on

both the Marquette and Ontonagon branches to the public domain of the United States.

Suppose we admit for the sake of the argument that that was a wrong decision, is it void? If it is void so far as this canal company is concerned, it is equally void for every acre which was sold at private sale during this time; it is equally void as to every acre that was allowed to be pre-empted or homesteaded. It is equally void for all lands selected and given to the Chicago and Northwestern Co. on the new line for the 142,430.23 acres of clear lands surrendered on the Ontonagon line. For if they had not been surrendered, the title was in the State; and any Court assumes a very serious function, when, after these documents have been acted on by the officers of the Government and of the State to whom is committed the decision in these matters for a long series of years, on which great and important rights have vested, when it assumes to say—it should be done very cautiously—that all this is void from the beginning to the end.

Let us see what the Supreme Court says upon that subject. The case of the United States vs. B. & M. R. R. Co., 98 U. S., 334. In that case there was a grant of land opposite a railroad, and the company went on and selected lands way out in Nebraska, fifty miles away, and got a patent. And they selected lands on the north side of the road instead of on the south side to meet a deficiency in the grant; and then the United States came in and filed a bill in equity to set aside the patent, and failed.

"Such has been the uniform construction given to the acts by all departments of the Government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential as if it had been declared

by judicial decision. It cannot at this day be called in question."

That is all I need to say on that point. My conclusion, therefore, is that we have the original title, under this certification of 1871 to the lands then certified both in the "clear" and in the "common limits," and that as to the common limits lands at all events there is nothing inconsistent with that view in anything adjudged in the opinion of Judge JACKSON.

The Releases Again.

THE COURT: Before you leave that subject let us hear what are the descriptions of lands in the last release by the railroad company and by the Governor.

JUDGE DILLON: That is 143,430.23 acres on the Ontonagon clear list (Record, p. 162).

THE COURT: Is it limited in terms?

JUDGE DILLON: Oh, entirely so. You will see by Judge JACKSON'S opinion he limits his opinion to said 142,430.23 acres. In other words, all was released in 1868 except the clear lands on the Ontonagon line, and that was released in 1870 (Record, pp. 161, 162).

JUDGE MARSTON: Didn't I understand that this release purports to release not only the clear lands but the common limits lands?

JUDGE DILLON: Yes, the clear lands on the Marquette line, and the common lands on the Marquette and State line and the Ontonagon and State line were released prior to 1870. The release of 1870 is confined to the clear lands on the Ontonagon line.

THE COURT: Then on the other side when were the common lands relinquished, if at all; when was there any attempt to relinquish?

JUDGE MARSTON: Unless they were included in that first relinquishment of the Peninsula Railroad Company, they were never relinquished until this relinquishment of January 31, 1868. That is, there is no evidence of it.

JUDGE DILLON: In January, 1868.

THE COURT: That relinquishment was subsequent to the Act of the Legislature of February 21, 1867.

JUDGE MARSTON: Yes, your Honor; the other was prior.

THE COURT: So that upon the evidence, as it stands, unless this relinquishment of January 31, 1868, (Record, pp. 151–153), had been drawn up and executed, and remained without date, for delivery, or something of that sort, then this old surrender of the Peninsula Railroad Company must be the one that is referred to in the resolution of the Michigan Legislature?

JUDGE DILLON: It is the only one we know to be in existence. The release of the Peninsula Company was to the United States, and not to the Governor. It don't answer the description, but it is the only release of which we have any knowledge, as being in existence prior to the resolution of February 21, 1867.

JUDGE MARSTON: Your Honor will notice that it purports to be executed 31st January, 1868, and acknowledged on that date; so that it could not have been delivered. If drafted, it was not executed.

THE CONFIRMATORY ACT OF 1889, CONSIDERED.

[Reprinted in full in our main brief, pp. 164-166.]

JUDGE DILLON: The ingenuity of the human mind is infinite. Among the surprises of this case to me is the serious contention that the Act of March 2, 1889, has no reference, in its confirmatory provisions, to the canal lands.

The learned counsel stated his general knowledge of the situation preceding the passage of this act. I will state mine. That Act was submitted to counsel; it did not go through in private; it was a public matter; it was not passed in a day; and the counsel of the canal company, myself among others, said "that is sufficient to confirm your title." There is no doubt about it, that just what it reads is what was intended—intended by this act to make a final disposition, so far as Congress was concerned, of this long and vexatious matter.

We get at the purpose of the Act of Congress, not by what the learned counsel understood was intended, or what I understood was intended, but by its language, read in the light of contemporaneous history.

Act of 1889 was Intended to Confirm the Title of the Canal Company to the Lands in Suit.

The first section of this act is a forfeiture, pure and simple, of "all lands heretofore granted to the State of Michigan under the Act of 1856, which are opposite to, or coterminous with, an uncompleted portion of any railroad." Therefore, wherever, in the

State of Michigan, you have any uncompleted railroad, any of the lands mentioned in the Land Grant Act, the lands opposite any uncompleted portion of it are forfeited. If that stood alone, we all understand—our elementary learning carries us that far; the learned counsel on the other side conceded it, and it is so—that when a grantor enters to defeat an estate for breach of condition subsequent (which is this case) he enters as of his first estate; and everything that has been done by the conditional grantee, whether by way of mortgage, charge or otherwise, is absolutely sponged out, and the legal effect of the forfeiture is that the United States becomes vested with the title to the lands forfeited as of the third day of June, 1856, and they would be in legal contemplation, after this act of forfeiture, public lands throughout all the interim between the date of the Land Grant Act, in 1856, and the act of forfeiture in 1889. And, therefore, there would be great ground to contend that where, by this principle, the lands are treated in law as the public lands of the United States from the date of the granting act, having, in the interim, been selected as public lands to fill the canal grant, that it confirmed that selection. But it is not necessary to insist upon that view, because we are expressly provided for and confirmed by the third section of the act. Here is the measure of justice which Congress intended to mete out to the canal company. It had spent millions of dollars in building the canal; never had been paid anything except these lands.

JUDGE MARSTON: That is not correct.

JUDGE DILLON: What has it had, except these lands?

JUDGE MARSTON: It has had all the lands certified to it, except these few thousand acres.

JUDGE DILLON: I mean that. I mean these 15,000 acres now in dispute, of course. We could have entered them at the time at a dollar and a quarter an acre. Three millions and a half of bonds found by the decree of this Court to be outstanding in the hands of *bona fide* holders.

MR. DICKINSON: Is that the evidence—that they expended three millions and a half? They pledged the bonds, and the bonds were sold at ten cents on the dollar.

JUDGE DILLON: This Court, through its Receiver, expended $638,000 on the canal after the case got into this Court (Record, p. 70). The lands are to be the compensation to that company:

"Provided further, that this act shall not be construed to prejudice any right of the Portage Lake Canal Company or the Ontonagon and Brule River Railroad Company, or any person claiming under them, to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may now be entitled" (Sec. 2).

That was put in by our friends to prevent some captious gentlemen from saying that the rigid effect of the forfeiture would be to preclude and cut off any rights or equities that you may now have; and now these gentlemen come in here and say that *that* was intended as the full measure of relief to the canal company; the right to go to Congress is reserved to them, and the right to bring a suit in the Courts of the United States. We have those rights, as your Honor suggested, with-

out this act. That such was the purpose is plain; because Congress cannot affirm that to be a right in our favor which we have without it. But it was put in for our benefit to prevent forfeiture, declared in the preceding section, from being construed to our prejudice, and it has nothing to do with what follows in Section 3. That is all I have to say about that proviso in Section 2.

True Construction and Effect of Sec. 3 of the Act of 1889.

"SEC. 3. *That in all cases, when any of the land forfeited,*" &c., &c. Our case is in every clause of that section. "That in *all* cases." I was in the Court of Chancery one day in England some years ago. There was a case before Vice-Chancellor Bacon, and some counsel got up in a wig and gown and said, "My case, may it please your Honor, is the construction of a clause in a will. The deceased says, 'I give all my property, real, personal and mixed, to so and so.' I am here to contend that the property, real, personal and mixed, does not embrace a certain chose in action." The Vice-Chancellor said, "Do I understand you, my brother, to say that when the deceased said 'all,' he didn't mean it?" "Yes, your Honor." "I don't care to hear you," and he sat him down. Now, this Section 3 is an independent provision. "That in all cases"—we ask your Honors to read it as Congress enacted it. They ask your Honors to read it, "All cases except this Canal Company," and to put by judicial construction, those words of exception into it. "That in all cases where any of the lands forfeited by the first section of this Act." Those are railroad lands; those embrace

the lands that constitute the *locus in quo;* so we are within that clause. "That when *any* of the lands." As broad as the word "all." We say it means what it says. They say "any lands except these canal lands." "*Or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes.*" I pause there for a minute, and I defy any master of the English tongue, expressing this in general language, to express it in language more apt as descriptive of what we have in this regard than this; and there is nothing before you in this case to show that that clause has any reference to anything else than these very canal lands.

"*Or, when any lands relinquished to the United States.*" That is the term that is used here—relinquished or surrendered, "*from grants for railroad purposes, or for any cause resumed by the United States*"—meaning that the United States had resumed these very lands, under the relinquishment of the companies and the relinquishment of the Governor, and undertook, as we have seen to certify them to the Canal Company, and sold them to hundreds of persons who came to purchase and to pre-emptioners and homesteaders.

"*Heretofore made to the State of Michigan, have been heretofore disposed of by the proper officers of the United States?*" Don't that exactly apply to the disposition of these lands by the Secretary of the Interior? Wasn't he the proper officer to approve the lists under the canal grant, and had any other officer on earth the power to act in this matter but the Secretary of the Interior? "*Or, under State selections.*" They refer that some mythical selections that nobody knows anything about, and say that it don't mean selections in Michigan under the State for this canal com-

pany. "*Under the State selections in Michigan, confirmed by the Secretary of the Interior under color of the public-land laws.*" I don't know of but two classes of laws—public and private. This does not mean private laws. It is not referring to that.

THE COURT: I notice that the words "public-lands" are connected by a hyphen, so it don't mean public law but public-land laws.

JUDGE DILLON: I am obliged to you for the suggestion. Truth is always consistent. The more you agitate a thing the more clearly it comes out. If a fellow has a poor case he wants a short argument.

"*Where the consideration received therefor is still retained by the Government.*" Well, who did the consideration move from here for these lands? The canal company paid the required consideration. It built the canal. It got its pay in lands—and could get it in no other way. We are entitled to four hundred thousand acres under the contract, are we not? We haven't got any more even if we succeed in these suits. Our grantors furnished the consideration, and it is still retained, isn't it? Aren't we within the equity of this as well as its language?

"*The right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed.*"

Another curious thing, your Honor, the last learned gentleman who addressed you (if I am wrong now, let him state it) says that is a confirmation *in futuro* or *in præsenti*, and that it did not relate back at all, but only confirmed the title from the second day of March, 1889, and, as one of these suits (Cunningham's) was brought before, that we cannot, for that reason, in such

suit have the benefit of the confirmation even if we are within the purposes and provisions of the Act. Well, that shows the manifestation of a weakness that our learned friends have no faith in any one point, and hence they fire a shot at the flock.

If your Honors will turn to the case of Redfield vs. Parks (132 U. S., 239), decided last fall in the Supreme Court of the United States, you will find it in point in principle. I was counsel in the case and argued it. The plaintiff brought suit as a purchaser of land at judicial sale. He supposed the deed had been made to him, and, on that supposition, brought ejectment; and it turned out on the trial that there had been a mistake in the deed, and he got a new deed *pendente lite*, and the Court allowed him to maintain a recovery on it.

"*The right and title of all persons holding or claiming under such disposal shall be, and is hereby, confirmed.*"

The Supreme Court of the United States has often discussed this word "confirmed" (see our main brief, Point VIII., p. 144 *et seq.*, for further discussion of this technical objection to our recovery).

THE COURT: There is a little difficulty in my mind about the proposition, whether, assuming that to be so, a party could maintain an action begun before the final confirming event.

JUDGE DILLON: That case of Redfield vs. Parks was very much more infirm in this respect than this. Besides the Act of 1889 is not only a conveyance but a law as well, and binding as such on all persons. I want to suggest another idea. It is very important. If we haven't had our four hundred thousand acres of land for the building of this canal, we are entitled

to it. Congress of the United States has said that the title of this canal company to the lands selected for it "is hereby confirmed." Suppose we wanted to say—and under the views of these learned gentlemen we are entitled to say—that that certification of these lands for the canal company in 1871 is void, and we have never had any lands, and we go on and select lands in lieu thereof somewhere else. Wouldn't the Government of the United States say to us, "You can't do it? In 1871 these lands were selected for you; they were certified to the State for your benefit; you accepted them; you have held on to them from that day to this; and in 1889 Congress of the United States says, 'Your title is confirmed,' making it good and valid from the beginning?" Wouldn't it be binding on us? If Judge JACKSON is right, we could select other lands; but, when we offered to do it, the Government could say, "Your title is confirmed, and you have got to keep the lands." Would we not be bound to keep them and be content?

Sec. 2 of the Act of 1889 Again Discussed.

THE COURT: Judge DILLON, at first I was strongly inclined towards the view that you take, but in consideration of this third section, the matter which created difficulty with me was, that provision restricting this confirmation to those cases where the consideration received therefor is still retained by the Government. What is to be the construction of that language? "*The consideration received from them is still retained by the Government.*" Does that mean where the general purpose and object of the grant has been executed by the construction of the work contem-

plated? Is it so wide as that, or does it contemplate those cases where the Government has received the consideration which it might have returned, but chose to withhold? In one case it has no choice, in the other it has; and does this not mean a voluntary retention?

JUDGE DILLON: It occurs to me that this confirmatory provision should not be regarded with a hostile aspect. It is remedial and benign. If the consideration has been money received, and the Government chooses to retain it, then your suggestion is that this provision applies?

THE COURT: Yes, or land or other valuable thing which could be returned.

JUDGE DILLON: Well, the Government don't get land very often; it gets money. Here was a consideration: The grantee of the State of Michigan, and its assignee, the canal company, executed in good faith the public work for which these lands were received in payment; the canal company earned the lands and the Government receives the consideration—enjoys it.

THE COURT: Is that a consideration? Is it not rather a condition? It seems to have received the consideration which is always contemplated in these public grants; viz., the execution of the work in view, whether it be a railroad, canal or what—

JUDGE DILLON: This is a general act, your Honor perceives, and its provisions are in very comprehensive language. These are public works. The Government is spending money on them all the time; and, as this is

dealing with a grant where the consideration was the public advantages to the United States accruing from the execution of the work, and where the Government retains all the consideration that it ever had; it seems to me a stronger reason for saying that it should apply to that case, because otherwise the party is remediless. If this act does not confirm the title, and if the title is void, the Government cannot return anything, but can only go on and give the canal company other lands in lieu of those it selected for it and undertook to give to it; and there are no lands left. [The Government has since then purchased the canal under the authority of an Act of Congress.]

THE COURT: The equity of the matter is clear enough, but the question is one of construction.

JUDGE DILLON: I don't think that a general provision of this kind, intended to confirm, should be subjected to a construction against the plain equities of the case.

MR. DICKINSON: What do you do with the last clause of Section 2 of this act—shall be without prejudice to the rights of any person claiming an adverse interest in the lands—in connection with the reference to the Portage Lake Canal Company?

JUDGE DILLON: That is referring to the forfeiture provision. And it means to say that the fact that these lands have been forfeited shall not affect unfavorably either the canal company or the Ontonagon Company, or anybody else. That is all there is of that.

THE COURT: There is another provision in that second section: "*That nothing in this act shall be con-*

strued to prejudice any right of forfeiture, as hereby declared, or recovery of the United States in respect of any of the lands claimed by any of the said companies." That is by the Portage Lake Canal Company or the Ontonagon and Brule River Railroad Company. If the next section confirms the title of the company, what meaning do you give to that last clause of the second section?

JUDGE DILLON: My own notion of that is that that clause was put in to guard against all possible effects, perhaps unknown exactly, as to a broad general declaration of forfeiture. It has no reference to Section 3.

JUDGE MARSTON: Was it not the intention of that clause that the United States Government might recover any lands that were not claimed by homesteaders within this particular tract? In other words, that while it attempted to protect homesteaders, some of these lands which you claim were then forfeited cannot be claimed by homesteaders, the United States might institute proceedings to recover them.

Consideration of Section 3, Act 1889, Resumed.

JUDGE DILLON: What I have to say on the last proviso in Section 3 is very brief.

"*Provided, however, that where the original cash purchasers are the present owners, this act shall be operative to confirm the title only of such cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud, and in the belief that they were thereby obtaining valid title from the United States*" (Sec. 3).

I pass that, with the observation simply, that they confirm their title, where they still own the lands, only

when the Secretary is satisfied they bought without fraud, and in the belief that they were getting a valid title. This sheds some light on the next clause, as to what Congress meant when they said "*bona fide.*" For, observe, this, unlike some acts, don't confirm the title or right of all actual settlers. What Congress meant was, so far as these lands have been disposed of under State selections, under the conditions approved by the Secretary, the consideration retained, whatever that was, to confirm such titles; but if there has been a *bona fide* pre-emptioner on these same lands or selections, and he had a *bona fide* claim on the first day of May, 1888, the confirmation must be taken subject to the prior confirmation of such pre-emptor's right. That settles that. Then, as to any other of the railroad lands, which were forfeited by Section 1, they are made a part of the public domain of the United States, and in that way we have a reasonable and consistent construction of the act. Now, what was the language used to express this last idea?

"*Nothing herein contained shall be construed to confirm any sales or entries of lands*"—putting the canal and private entry men on the same footing. "*Nothing herein contained shall be construed to confirm any sales or entries of lands or any tract in any such State selection.*"

The first clause relates principally to these private sales; the second relates to these canal lands by general description.

"*That nothing herein contained shall be construed to confirm any sale or entries of lands or to confirm any tract in any such State selections, upon which there were bona fide pre-emption or homestead claims on the first day of May, 1888,*"—there they draw the line--"*arising or asserted by actual occupation of the land under color*

of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed."

Now, what is the meaning of the word "*bona fide?*" This is not a question, as my learned friend Mr. Dickinson ingeniously suggested, of public land laws, where the inquiry is whether a settlement was actual and *bona fide* in the sense of going on with the intention of making it a homestead; but here is a case where Congress is dealing with two rights. It don't intend to claim the land itself, but it is settling priorities between two classes of claimants. On the one hand is one party to whom these officers have certified these lands for value, and that has passed into the hands of other people. Now, it says generally, "we confirm your right, but if there is anybody who has a *bona fide* claim as against you and your rights, a *bona fide* pre-emption or homstead claim on the first day of May, 1888, we confirm him in preference to you."

The Court: We have no difficulty about that branch of the case. It seems to us impossible to hold that a man is a bona fide settler or pre-emptioner upon public lands, when he knows at the time the lands are not open to entry. He don't enter under color of the laws of the United States, when he enters in the face of the law, and knows that he has no legal right to enter when he does.*

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*NOTE. The subject of the Act of 1889 is more fully discussed in our main brief, where its legislative history and the manner in which the act is built up are shown, and its purpose made demonstrably clear to confirm the canal company's title. That history and the debates were not before us when this argument was delivered.

Discussion Resumed as to Joint Resolution of July 5, 1862, and the Releases to the State and the United States.

MR. DICKINSON: One word, if your Honors please, upon the point upon which your Honors stopped me in my argument, and upon which you have heard Judge DILLON in full. I shall say but a word, and that is with reference to the position taken, that the consolidation with the Chicago and Northwestern in some manner sustains the position that there was a release of the entire title to the common limits. I reply to that, in the language of the Secretary of the Interior:

"The recital in said deeds does not set up title in the Chicago and Northwestern Railroad Company in and to the lands thereby relinquished, neither does it show any authority on the part of the Governor of Michigan to make a valid deed of relinquishment of said lands on behalf of the State of Michigan, said recital being the same as the recital in the deed of relinquishment made May 1, 1868, by said Chicago and Northwestern Railroad Company and the Governor of Michigan, of the lands originally granted on the line from Marquette to the Wisconsin State Line, which lands, as stated above, had been duly conferred upon the Peninsula Railroad Company and its successors, by action of the Board of Control, duly had, and subsequently confirmed by Act of the Legislature of the State of Michigan."

The Peninsula Road, by the Confirmatory Act of the Legislature, and by the action of the Board of Control, was vested by the terms of the act and by the recitals in the deed with nothing that was not originally granted to the State of Michigan for the building of a road from Marquette to the State Line, and no release, executed by the Chicago and Northwestern prior to the unauthorized release of 1870, purports on its face

to release anything except what had been granted to the State to build the old road from Marquette to the State line. So that the consolidation cuts no figure, because no act of the consolidated company assumes to convey any interest in the lands which were assigned to the building of the road from Ontonagon to the State line.

Counsel has stated that the reports of the committee of Congress had always been in favor of confirmation.

JUDGE DILLON: No, the bills reported.

THE COURT: So far as that matter is concerned, we haven't those reports before us, and we probably shall not refer to them at all.

MR. DICKINSON: I did not think your Honors would. But it is not a fact. It is a misapprehension of the learned counsel I cited in my brief, and handed it to Judge JACKSON, the report of the committee of the Forty-eighth Congress.

THE COURT: While you are up, Mr. Dickinson, I will call your attention to *Section 5 in the Joint Resolution of July 5, 1862*, of Congress. It is to this point: To ascertain what the construction of the defendants is of the language, "*It is further resolved that upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office*," &c., &c. Now, how do you reconcile that language with the right of the new company to take the *whole* of the lands along its line? To make my meaning clear: Suppose that there should have been a relinquishment of five thousand acres of those certified lands only—of the old

lands; could the new company take all the lands within six miles of its limits?

MR. DICKINSON: Yes, your Honor; for this reason, so far as Section 5 is concerned. We come back again to the recital, and to the reference in the second line of Section 5 to the "lists" referred to as of said railroad lands. "Said railroad lands" refers to the grant of the Federal Government to the State of six sections a mile on the line from Marquette to the Wisconsin State line, and could not embrace any other lands than are included in that recital, referred to in Section 5, as "said railroad lands."

THE COURT: Wouldn't that construction leave it wholly optional with the new railroad company as to whether it would release much or little of the old grant?

MR. DICKINSON: Even if that were so, the Chicago and Northwestern, as your Honor will see by the release itself, purports to release nothing except the interest of the Marquette and State Line.

THE COURT: I am speaking now of the construction of the act. What was afterwards done, would be quite another matter; but looking at the construction of this act, I confess it is a new point to me. I never noticed it before. If the construction be that the new company were entitled, under the provision of this joint resolution, to six miles on either side of the new line of railroad upon relinquishing only part of the old grant, then it left it wholly optional with it whether it would release ten acres or one, or two hundred thousand.

JUDGE MARSTON: *May it please the Court*, my view of that is this: It unquestionably, as I said before, or intended to say, this forenoon, was the intent of Congress that all these lands, certainly within the clear limits, were to be released by the Marquette and State Line, as located by the old original line, and then it was to take on the new line, *but not limited on the new line to the number of acres released;* but if, on the contrary, it did not release but a part of the old lands on the original line, to that extent that it did not release it would be charged against it in taking up the new line. That leaves it a question of construction for the Court; to say whether Congress intended that it should release its interest in the common limits lands, so that the State might own an undivided half, and the Government an undivided half. Your Honor put a question to me this morning upon that subject, which I answered to the best of my ability—that under certain circumstances it would be a question of construction. I have no doubt in my own mind that this company could not retain all the lands upon the original line, and yet claim six sections upon the entire new line. To the extent that Congress intended it should release, it must do so, and be charged with what it retained; and the question would be whether Congress intended that it should release the common limits, so that the United States would simply own a moiety.

THE COURT: Suppose under this act they chose to relinquish, say three-quarters, and held on to some choice pieces. Now, what is the consequence upon the right of the new company along the new line to receive lands, and how are those new lands to be measured—the extent of them?

JUDGE MARSTON: *May it please your Honor*, suppose that 112,000 acres were certified to the company, and it was about that number, upon the original line, and upon the new line it was entitled to, say 150,000 acres. The number of acres is immaterial, except for illustration. Now, upon the old line, instead of surrendering 112,000 acres, it surrenders 100,000. The 12,000 would be charged to it, and instead of getting 150,000 upon the new line, it would be that number less the 12,000 that it had retained. In other words: You can carry this to an extreme either way. Suppose it release everything but an eight-acre lot; would that prevent its getting any land upon the new line? Clearly not.

THE COURT: The point is whether or not this provision does not give color to the suggestion that the *quantity to be received was to be measured by acres, instead of by limitations.*

JUDGE MARSTON: Your Honor will observe that in many of the acts permitting these changes—take the Fond du Lac change; there they were limited to the same number of acres. Your Honor will remember the Marquette, Houghton and Ontonagon, that I referred to this forenoon; that was expressly limited to the same number. There are other instances of the same kind, but here there is no such limitation. It is not that they shall have a like quantity only, as in some acts, but that they shall have a like extent, to the extent of six sections per mile. But I do not believe that they can retain both. They are charged on the new line with what they do not release on the old. If they retain a hundred acres, they are charged with it; if

they retain ten thousand, they are charged with it, and, if they retain fifty thousand, they are charged with it.

JUDGE DILLON: The old line was abandoned. They never had earned any lands. It was not contemplated that they could keep them or have credit on the other. They never got any title to the lands on the old line, because they never constructed the railroad or any part of it. They wouldn't be earned. And when Congress says, "a like quantity as the land surrendered," it excludes any such construction.

MR. DICKINSON: The department construed it. Undoubtedly it was contemplated that lines might run for some distance together, and they would only surrender for the six miles on each side, where the old line was not followed by the new line. That would seem to me to be a fair interpretation.

THE COURT: The case is full of complications and embarrassing questions. Some of these have been already settled, and in respect of which, whatever might be our opinions, we are now bound. So far as the questions involved in the case have been decided by the Circuit Judge, we shall, of course, unhesitatingly follow the ruling which he has laid down in his opinion upon the motion for a new trial, and shall hold that upon the facts as presented in the cases of Cunningham and Finan, that the canal company acquired no title by the proceedings which have been given in evidence.

The case, in respect to the lands claimed by Donahue, which lie in the "common limits," is one which presents some new questions which were not passed upon, and of course could not be, in the case which was previously tried, and in which Judge JACKSON delivered

his opinion. Then there is the question which was expressly reserved in the opinion of the Circuit Judge, to be presented and construed upon the new trial, of the effect of this act of forfeiture and confirmation of March 2, 1889. With respect to this, it being now so late in the afternoon, not having entirely satisfied ourselves as to what rule we ought to hold, we think we will defer giving a final opinion until to-morrow morning at nine o'clock. This case is one of importance, and we desire, so far as we are able, to form a definite judgment, and to do so with as much consideration as possible. (See the instructions asked and the charge and opinion of the Court, Record, pp. 180-188).